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No. 07-____

IN THE

Supreme Court of the United States

ZEN HUA DONG,

Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding, contrary to five of its sister circuits, that the Attorney General may not extend a presumption of asylum eligibility under 8 U.S.C. § 1101(a)(42) to a person whose spouse—or, *a fortiori*, fiancé—was forced to undergo an abortion or sterilization pursuant to a coercive population control regime.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were Shi Liang Lin, Zhen Hua Dong, and Xian Zou and Respondent Attorney General of the United States. Mr. Dong is the only remaining petitioner.

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INTRODUCTION

The decision below merits this Court's review because it creates a clear conflict in the lower courts on a significant question of immigration law—whether the Attorney General has the authority under § 101(a) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101(a)(42), to treat persons whose spouses were forced to undergo an abortion or sterilization pursuant to their government's coercive population control program as presumptively eligible for asylum because of persecution on account of political opinion.

Through three presidential administrations, Congress, the Department of Justice, and the Immigration and Naturalization Service have maintained that the Attorney General enjoys such authority. Since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which expanded the scope of asylum eligibility under INA § 101(a), five courts of appeals have upheld that position.

However, the decision below—the product of a divided en banc court reaching out to decide an issue not squarely before it—holds that the Attorney General may not extend asylum eligibility to spouses of persons compelled to have an abortion or sterilization if they themselves have not been subjected to that procedure. Within the Second Circuit alone, between 70 and 80 percent of all asylum applicants are aliens fleeing China's repressive family planning laws. Outside the Second Circuit, the decision deeply divides the courts of appeals in an area where uniform application of federal law is of the utmost importance.

Accordingly, petitioner respectfully submits that this Court's review is warranted.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1a-95a) is reported at 494 F.3d 296 (2d Cir. 2007), and the prior opinion of a panel of the court of appeals (Pet. App. 103a-116a) is reported at 416 F.3d 184 (2d Cir. 2007). The first decision of the Board of Immigration Appeals (Pet. App. 117a) is *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Sept. 25, 2002); the second decision of the Board of Immigration Appeals is *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Nov. 27, 2006) (Pet. App. 96a-102a). The decision of the Immigration Judge (Pet. App. 118a-125a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2007. On October 5, 2007, Justice Ginsburg granted petitioner an extension of time in which to file a writ of certiorari up to and including November 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 101(a) of the Immigration and Naturalization Act, as amended by § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, provides that:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such

> person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) . . . . The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42).

STATEMENT

This case concerns the Attorney General's authority under the Immigration and Naturalization Act to grant asylum to a person whose spouse was forced to undergo an abortion or sterilization pursuant to the family planning laws of the People's Republic of China (the "PRC" or "China"). The longstanding policy of the United States, expressed in legislation, regulations, and official statements of Executive Branch policy, is to afford relief to both members of the marital unit because the couple has been and remains the target of coercive family control practices implementing PRC's "one couple, one child" regime.

The PRC's Coercive Family Control Program

In 1979, the PRC publicly announced plans to regulate the birth rate in China via a family planning program. INS Resource Information Center, U.S. Dep't of Justice, China: Family Planning Policy and Practice in the People's Republic of China 3 (Mar. 1995) (*available at* http://www.uscis.gov/files/nativedocuments/prchn95-001.pdf). The program's central feature is a state-imposed limit on the number of children a couple may bear, known as "one couple, one child." *See id.* Compliance is enforced by requiring couples to obtain permission to become pregnant or face a wide range of penalties. *Id.* at 15-18.

Although Chinese law formally prohibits the use of coercion to compel a couple to submit to a forced abortion or sterilization, "implementation of the policy by local officials [has] resulted in serious violations of human rights." U.S. Dep't of State,

Country Reports on Human Rights Practices: China 2006 (2007) (*available at* http://www state.gov/g/drl/rls/hrrpt/2006/78771.htm). Reported decisions of the federal courts confirm that forced abortion and sterilization remain prevalent official practices in the PRC.[1]

The PRC's coercive family planning program targets fathers as well as mothers of unauthorized children. China's National Family Planning Law requires that "husbands and wives shall bear *joint responsibility* in the implementation of family planning." *See* Law of the People's Republic of China on Population and Family Planning ch. 3, art. 17 (promulgated Dec. 29, 2001; effective Sept. 1, 2002) (emphasis added) (*translation available at* http://www.lawinfochina.com/law/display.asp?db=1&id=2209&keyword=Population,Family%20Planning). "For those in violation of this Law, failing to perform the obligation of assisting the family planning management, the relevant local people's government shall order *them* to make corrections and circulate a notice of criticism . . . ." *Id.* ch. 6, art. 40 (emphasis added).

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[1] *See, e.g., Yang v. U.S. Att'y Gen.*, 494 F.3d 1311 (11th Cir. 2007) (government forced abortion approximately six months into pregnancy because husband and wife were below legal age of marriage); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (family planning officials seized woman's sixty-three year old father-in-law to compel her to have abortion); *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004) (after wife became pregnant, husband was arrested, beaten, and placed in solitary confinement for three days).

The Administrative and Legislative Response

The Immigration and Naturalization Act ("INA") vests the Attorney General with authority to grant asylum to an alien who establishes that he or she is a "refugee." INA § 208(b)(1), 8 U.S.C. § 1158(b)(1). Under INA § 101(a)(42), an applicant qualifies as a "refugee" if he or she "is unable or unwilling to avail himself or herself of the protection of [his or her home country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42).

In 1996, the Board of Immigration Appeals ("BIA" or "Board") held that "past persecution of one spouse can be established by coerced abortion or sterilization of the other," entitling the spouse to asylum if he or she also had a well-founded fear of future persecution. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (B.I.A. 1997) (Pet. App. 161a-198a, 165a); *see also* 8 C.F.R. § 1208.13(b)(1) (explaining nature of rebuttable presumption).

The Board in *C-Y-Z-* was not writing on a blank slate. Rather, its decision reflected a decades-old judgment by Congress and immigration officials dating back to at least the events of Tiananmen Square in 1989 that the Attorney General may accord presumptive eligibility for asylum to the spouse of a person forced to undergo an abortion or sterilization, or punished for refusing to do so.

On August 5, 1988, Attorney General Edwin Meese issued a memorandum to the Commissioner of the Immigration and Naturalization Service ("INS") expressing his view that all persons opposed to, and

targeted by, the PRC's coercive family planning practices meet the INA § 101(a)(42) refugee definition. *See Zhang v. Slattery*, 55 F.3d 732, 738 (2d Cir. 1995) (quoting memorandum). The BIA, however, rejected Meese's view, reasoning that because the "one couple, one child" policy "applies to everyone," it could not constitute persecution. *Matter of Chang*, 20 I. & N. Dec. 38, 43 (B.I.A. 1989); *accord Matter of G-*, 20 I. & N. Dec. 764, 778 (B.I.A. 1993).

Congress promptly responded by passing the Emergency Chinese Immigration Relief Act on November 20, 1989, H.R. 2712, 101st Cong. (1989). In pertinent part, the measure would have provided eligibility for asylum where the "*applicant's spouse* . . . refused to abort a pregnancy or resisted sterilization in violation of China's family planning policy directives." *Id.* at § 3(b) (emphasis added). Although President George H. W. Bush vetoed the proposed legislation on November 30, 1989, he did so in part because of diplomatic considerations and on the express understanding that executive branch action would provide "greater protection" to persons targeted by coercive population control programs than H.R. 2712. *See* President's Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 Wkly. Comp. Pres. Doc. 1853, 1853-54 (Jan. 23, 1990).

Six days later, Attorney General Richard Thornburgh issued an interim regulation acting on President Bush's veto message. *See* 55 Fed. Reg. 2803-02, 2804 (Jan. 29, 1990). Like H.R. 2712, the regulation provided asylum eligibility for an applicant who had a well-founded fear he or she would be forced to abort a pregnancy or be sterilized.

The regulation also reaffirmed that the spouse of a person forced to abort a pregnancy or be sterilized was eligible for asylum. *See id.* at 2805 ("[e]ligibility for withholding of deportation on account of political opinion is established by the respondent who establishes that he or she (*or respondent's spouse*) will be required to abort a pregnancy or to be sterilized . . . .") (emphasis added).

On April 11, 1990, President Bush issued an Executive Order referring to the interim rule, again requiring "enhanced consideration" for persons fleeing the PRC's family planning laws. *See* Exec. Order No. 12,711, 55 Fed. Reg. 13,897, 13,897 (Apr. 11, 1990). President Bush's Executive Order was implemented by a memorandum from the INS general counsel, released on November 7, 1991, directing that all victims, including spouses, of coerced abortions and sterilizations were eligible for asylum. Memorandum from the Office of General Counsel of INS (Nov. 7, 1991), *reprinted in* 69 Interpreter Releases app. I, at 311, 311 (1991) ("an applicant . . . *and the applicant's spouse*" will be considered by the INS "to have established presumptive eligibility for asylum on the basis of past persecution on account of political opinion if the applicant has been forced to abort a pregnancy or to undergo involuntary sterilization or has been persecuted for failure or refusal to do so") (emphasis added).

Attorney General Thornburgh's final rule inadvertently omitted the forced abortion and sterilization provision. *See Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1337 n.4 (4th Cir. 1995) (describing omission as "mere inadvertence"). The

error was corrected, however, by a rule issued by Attorney General William Barr in 1993. *See* Att'y Gen. Order No. 1659-93 § 208.13(2)(ii), *reprinted in Guo Chun Di v. Carroll*, 842 F.Supp. 858, 864 (E.D.Va. 1994). The rule provided that "[a]n applicant (*and the applicant's spouse, if also an applicant*)" could establish refugee status by showing he or she was victimized by coerced abortion or sterilization. *Id.* (emphasis added). Though scheduled to take effect on January 25, 1993, the Barr rule was withdrawn shortly before President Clinton took office pursuant to a policy that required the incoming agency head to approve all new regulations.

In 1996, after the Clinton Administration failed to issue specific regulations addressing whether victims of the PRC's coercive family control practices were eligible for asylum, Congress passed section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-689 (codified at 8 U.S.C. § 1101(a)(42)) ("IIRIRA § 601," "section 601," or "1996 amendment"). Congress stipulated that coerced abortion and sterilization amount to "persecution on account of political opinion":

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion . . . .

8 U.S.C. § 1101(a)(42).

In the Clinton Administration's first official interpretation of the 1996 amendment, the INS general counsel stated that section 601 was specifically intended to overrule the BIA's decisions in *Matter of Chang* and *Matter of G-*, *supra.* Memorandum from David A. Martin, INS General Counsel, *Asylum Based on Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Oct. 21, 1996) (Pet. App. 199a-209a).

On the very issue that is the subject of the Second Circuit's ruling below, General Counsel Martin expressly recognized that a person whose spouse was victimized by a forced abortion or sterilization was presumptively eligible under the statute for asylum:

> In general, we believe *that an applicant whose spouse* was been forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition. In such a case, the applicant may or may not have a well-founded fear of future persecution.

Id. (Pet. App. 205-206a) (emphasis added). As noted, the BIA shortly thereafter confirmed that spouses *were* presumptively eligible for asylum in *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) (en banc) (Pet. App. 167a). Until the decision below, *C-Y-Z-* remained the law nationwide.

Proceedings Below

Petitioner Zhen Hua Dong, a native of Fujian Province, applied for asylum, withholding of removal, and relief under the Convention Against Torture on March 22, 2000. In his application, Dong stated that local family planning officials forced his fiancé, Zhu Hua, to submit to two abortions. Pet. App. 121a. Dong further recounted that the officials warned him that he would be sterilized and fined if Zhu became pregnant again. Pursuant to a stipulation of the parties, the Immigration Judge ("IJ") accepted all of Dong's statements in his asylum application as credible. *Id.* at 122a.

The IJ, however, denied any relief under *C-Y-Z-* because he and Zhu were not legally married. *Id.* at 122-123a. On appeal, the BIA summarily affirmed. *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Sept. 25, 2002), *aff'g* No. A77 293 661 (Immig. Ct. N.Y. City Oct. 12, 2000). Pet App. 117a.

Dong then petitioned the Second Circuit for review of the IJ's decision. Because the panel had difficulty ascertaining the underlying rationale of *C-Y-Z-* and thus determining whether the BIA rationally could exclude asylum applicants in Dong's situation, it remanded to the BIA with instructions to

> (a) more precisely explain its rationale for construing IIRIRA § 601(a) to provide that the "forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse" and . . . (b) clarify whether, when, and why boyfriends and fiancés may or may

not similarly qualify as refugees under IIRIRA § 601(a).

Lin v. U.S. Dept. of Justice, 416 F.3d 184, 192 (2d Cir. 2007) (Pet. App. 104a-105a). The court noted it was asking for a fuller articulation of *C-Y-Z-*'s reasoning, without necessarily questioning the validity of the BIA decision. *Id.* at 191 (Pet. App. 104a-105a).

On remand, the BIA, sitting en banc, reaffirmed that a person whose spouse was forced to undergo an abortion or sterilization is presumed to be eligible for asylum. The Board further held that its ruling was limited to "applicants who are legally married under Chinese law." *In re S-L-L-*, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (Pet. App. 126a-160a, 130a).

Dong's case returned to the Second Circuit where the court *sua sponte* ordered rehearing en banc. On July 16, 2007, the en banc court issued its ruling declaring that *C-Y-Z-* was a statutorily unauthorized interpretation of the Attorney General's asylum authority.[2] *Shi Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 300 (2d Cir. 2007) (Pet. App. 4a). The court did not directly address whether the BIA properly limited presumptive eligibility to legally

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[2] While the Second Circuit majority read the BIA's decisions as granting "per se" asylum eligibility to the spouse of a person forced to undergo an abortion or sterilization, *C-Y-Z-* establishes only a rebuttable presumption of eligibility. *C-Y-Z-*, 21 I. & N. Dec. at 919 ("[I]nasmuch as the applicant has adequately established that he suffered past persecution, there is a regulatory presumption that he has a well-founded fear of future persecution") (citing 8 C.F.R. § 208.13(b)(1) (1997)) (Pet. App. 167a).

recognized marital units. Instead, the court ruled that "the BIA erred in . . . failing to acknowledge language in [the 1996 amendment] that is unambiguous and that does not extend automatic refugee status to spouses or unmarried partners of individuals § 601(a) expressly protects." *Id.* (Pet. App. 4a). The court reasoned that Congress had spoken unambiguously in IIRIRA § 601(a) as to which victims of the PRC's coercive family planning program were entitled to asylum eligibility: "Congress's specific designation of some persons (i.e., those who fear, resist, or undergo particular medical procedures) is incompatible with the view that others (e.g., their spouses) should also be granted asylum per se because of birth control policies." *Id.* at 307 (Pet. App. 19a).

The court next rejected the BIA's contention that general principles of asylum law supported its policy, noting that "the intention of Congress to limit the application of the clause to individuals who are themselves physically forced to undergo an abortion or sterilization.."[3] *Id.* at 306 (Pet. App. 16a-17a).

Five judges in three separate opinions disagreed with the majority's ruling that the 1996 amendment precluded the presumptive eligibility of spouses not themselves subjected to a forced abortion or

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[3] The court of appeals did recognize a narrow exception to its no-spouse coverage rule—where the spouse could prove resistance to the PRC's coercive family control program independent of the physically coercive practices, fines, and psychological abuse to which they and their partners were subjected for seeking to have children in violation of the program. *See Lin*, 494 F.3d at 313.

sterilization.[4] Judge Katzmann, joined by Judges Pooler, Straub, and Sotomayor, objected to the majority's application of the *expresio unius* canon to a statutory provision intended to broaden asylum availability. He explained that section 601 could not be read to *narrow* the availability of asylum:

> Congress's intent in enacting IIRIRA § 601(a) was to clarify that, contrary to the BIA's prior rulings, the imposition of some aspects of China's family planning policy can constitute persecution on the basis of political opinion, and that certain victims of that persecution are entitled to protection under our asylum laws.

Id. at 319 (Pet. App. 43a). The amendment thus did not "provid[e] an exhaustive list of those who could claim asylum relief because they were victimized by China's family planning policy," but "express[ed] a congressional determination that, contrary to the BIA's prior rulings, China's 'one couple, one child' policy is on its face persecutory, and victims of that policy who experienced persecution should be able to qualify for asylum relief without making an

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[4] Judge Katzmann's opinion concurred in the judgment en banc on the ground that the BIA's failure to apply *C-Y-Z-*'s presumption of spousal eligibility to fiancés and boyfriends was reasonable under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The reasonableness of not applying *C-Y-Z-* to asylum applicants such as petitioner was not, however, addressed by the *Lin* majority, *see Lin*, 494 F.3d at 304 (Pet. App. 14a); and is therefore not presented by this petition.

additional showing of their own political opinion." *Id.* at 321 (Pet. App. 48a).

Judge Sotomayor, joined by Judge Pooler, also wrote separately to highlight that the majority opinion "create[s] further circuit conflicts when such outcomes are easily avoided," and to emphasize that the majority's requirement of directly-suffered personal harm "may unduly and inappropriately limit the BIA not merely in cases under § 601(a) but in others as well." *Id.* at 328 (Pet. App. 63a). Citing BIA decisions which found that the torture of the applicant's father and brother could constitute persecution, Judge Sotomayor feared that the majority opinion called into doubt decisions where the BIA "identified specific situations in which the harm to close family members could be central to the finding of persecution and the granting of refugee status." *Id.* at 332 (Pet. App. 72a).

Finally, Judge Calabresi urged a further remand to the BIA to allow the agency to consider the authority for *C-Y-Z-* under the general INA § 101(a) definition of "refugee" independent of the 1996 IIRIRA amendment. The majority, Judge Calabresi observed, "perhaps realizing that it could not, at this time, authoritatively speak on the question of *C-Y-Z-*'s *reasonableness as a construction of § 1101(a)(42)(A)*—by preemptive strike strips the BIA of its capacity to consider the issue under § 1101(a)(42)(A)." *Id.* at 337 (Pet. App. 82a) (emphasis in original).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CLEAR CONFLICT IN THE CIRCUITS.

The Second Circuit's ruling below creates a clear conflict in the circuits on a significant question of immigration law—whether the Attorney General has the authority under § 101(a) of the INA, 8 U.S.C. § 1101(a)(42), to treat persons whose spouses were forced to undergo an abortion or sterilization pursuant to their government's coercive population control program as presumptively eligible for asylum because of persecution on account of political opinion.

As the court of appeals acknowledged, its ruling directly conflicts with decisions of the Third, Fifth, Sixth, Seventh, and Ninth Circuits. *See Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007) (Pet. App. 4a) ("recogniz[ing] that this decision creates a split among the circuits"); *see also id.* at 334 (Pet. App. 76a) (noting decision "is in direct conflict with every other circuit, the BIA, and ten years of rulings") (Calabresi, J., concurring in part and dissenting in part).

Prior to *Lin*, each of the five courts of appeals addressing the issue upheld the Justice Department's position that "[a] person whose spouse has been forcibly sterilized or forced to have an abortion is automatically eligible for asylum." *Zheng v. Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005); *accord Chen v. Att'y Gen. of U.S.*, 491 F.3d 100, 108 (3d Cir. 2007) ("In a great many cases, forced abortion or involuntary sterilization of one spouse will directly affect the reproductive opportunities of the other spouse, and so the BIA is not unreasonable in

considering the loss to the second spouse of the 'natural fruits of conjugal life'. . . ."); *Li v. Ashcroft*, 82 Fed. App'x 357, 358 (5th Cir. 2003) ("the involuntary sterilization of Li's wife constituted past persecution of Li") (unpublished opinion); *Huang v. Ashcroft*, 113 Fed. App'x 695, 698-99 (6th Cir. 2004) ("The BIA has previously decided that a husband 'stands in his wife's shoes' under [8 U.S.C. § 1101(a)(42)] and can receive asylum because of his wife's forced sterilization or abortion") (unpublished opinion); *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006) (applying *C-Y-Z-* presumption of past persecution).

In addition, in cases where a denial of asylum relief was upheld, four other courts of appeals—the First, Fourth, Eighth, and Eleventh Circuits—albeit in dictum, have also approvingly noted the spousal eligibility rule. *Lin v. Ashcroft*, 371 F.3d 18, 21 (1st Cir. 2004); *Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006); *Wang v. U.S. Att'y Gen.*, 152 Fed. App'x 761, 767 (11th Cir. 2005) (unpublished opinion).

In sum, each of these decisions recognizes that under INA § 101(a)(42), the Attorney General has the authority to treat a person whose spouse was forced to submit to an unwanted abortion or sterilization as presumptively eligible for asylum. Thus, the Second Circuit's holding that the Attorney General lacks such authority creates a direct and acknowledged split in the circuits over a substantial question of asylum law.

II. THE DECISION BELOW INJECTS CONSIDERABLE UNCERTAINTY INTO THE ASYLUM SYSTEM.

Review by this Court is necessary to prevent time-consuming and wasteful litigation in the wake of *Lin*. On July 27, 2007, the Third Circuit *sue sponte* ordered en banc review to assess "whether spouses of those victimized by China's coercive population control policy are entitled to automatic asylum under the Immigration and Nationality Act" and whether the Third Circuit should "adopt any or all of the reasoning announced in the Second Circuit's decision" in *Lin*. *Shi v. U.S. Att'y Gen.*, No. 06-1952 (3d Cir. July 27, 2007).[5] Only review by this Court can remove the uncertainty the ruling below has injected into the asylum system across the country.

After the Ninth Circuit, the Second Circuit hears the most asylum appeals—as many as the remaining courts of appeals combined.[6] *See* BIA Appeals

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[5] On September 1, 2007, the Attorney General certified *Shi* for review under 8 C.F.R. § 1003.1(h)(1)(i) and directed the parties to submit briefs "address[ing] all relevant statutory questions," including whether IIRIRA § 601(a) authorizes refugee status for "partners of individuals who have been subjected to forced abortion or sterilization, and whether the BIA interpretation of Section 601(a) set forth in [*Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) and *Matter of S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006)] is correct." *Matter of Jianzhong Shi*, Order No. 2905-2007 (A.G. Sept. 4, 2007). On September 4, 2007, the Department of Justice filed a motion to dismiss for lack of jurisdiction with the Third Circuit and on October 24, 2007, the court of appeals granted the Government's motion.

[6] Within the Second Circuit alone, between 70 and 80 percent of all asylum applicants are aliens fleeing China's repressive family planning laws. *See Lin*, 494 F.3d at 338.

Remain High in 2nd and 9th Circuits, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C. Feb. 2005), (*available at* http://www.uscourts.gov/ttb/feb05ttb/bia/index.html). According to a WESTLAW search by counsel, the Second Circuit alone had relied on the *Lin* decision in 106 cases by November 7, 2007.

Moreover, the decision below will have the effect of balkanizing the legal standards governing asylum. "Although the BIA seeks uniform nationwide interpretation of the immigration laws, it considers itself bound by the law of the circuit in which the administrative proceedings were held." *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994). Thus, asylum claims based on the PRC's family planning program are now adjudicated under two separate legal regimes, one for applicants who first arrive in this country in New York, Connecticut, or Vermont, another for those arriving elsewhere.

III. THE DECISION BELOW INCORRECTLY DECIDES A SIGNIFICANT QUESTION OF FEDERAL LAW.

The Second Circuit's decision is also plainly incorrect for several reasons. First, the court attributes the narrowing purpose of excluding spouses from asylum to the 1996 amendment when nothing in the language or statutory history of section 601 suggests the amendment was intended to *exclude* spouses from asylum. *See Lin*, 494 F.3d at 307 (Pet. App. 19a). The amendment does not speak in terms to spousal eligibility or to exclusion from asylum; for Congress's specific purpose in enacting the amendment was to broaden the availability of asylum by overruling the BIA's decisions in *Matter of*

Chang and *Matter of G-*, *supra*. The House Judiciary Committee, where the language of IIRIRA § 601(a) originated, stated in its report that the "primary intent" of the amendment was "to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-*." H.R. Rep. 104-469, Part I, 104th Cong., 2d Sess., 173 (1996) (considering H.R. 2202).

Second, the spousal-eligibility rule rejected by the Second Circuit reflects Congress's judgment that, in practice, the PRC's "one couple, one child" policy entails the persecution of both members of the family unit. As the House Committee noted in its report, the PRC's policies recognize that both partners in a relationship have a deep and abiding interest in the couple's reproductive life: "*Both men and women* who have met their 'quota' for children may be forcibly sterilized. *Couples* with unauthorized children are subjected to excessive fines, and sometimes their homes and possessions are destroyed." *Id.* at 174 (emphasis added). It is only natural, then, that the policy targets men as well as women, husbands along with wives. Congress's conclusion to this effect was supported by extensive evidence gathered at hearings held over many years,[7] as well as by the text of Chinese law (*see* p. 5 *supra*).

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[7] *See, e.g.*, Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the H. Comm. on International Relations, 107th Cong., 1st Sess. (Oct. 17, 2001); Hearings on Country Reports on Human Rights Practices During 1995 Before the International Operations and Human Rights Subcomm. of the House International Relations Comm., 104th Cong. 2d Sess. (Mar. 26, 1996); Forced Abortion and Sterilization in China: The View From the Inside: Hearings

Third, any doubt that the 1996 amendment is consistent with spousal eligibility was removed by Congress's further amendment of INA § 101(a)(42) in § 101(g)(2) of the REAL ID Act of 2005, Pub.L. 109-13, Div. B, Title III, § 301, 119 Stat. 231 (2005). Section 601 originally permitted the Attorney General to grant asylum to "not more than a total of 1,000 refugees," 8 U.S.C. § 1157(a)(5) (1994 & Supp. 1998). In the REAL ID Act, Congress *removed* this cap, allowing such asylum grants to an unlimited number of aliens persecuted under a coercive family control program. Congress's action reflects legislative approval of BIA asylum eligibility determinations under INA § 101(a)(42), including the spousal-eligibility rule introduced in *C-Y-Z-*. As Judge Katzmann noted,

> [w]hile the fact that Congress, in the course of its active attention to immigration issues and legislation, has not amended 8 U.S.C. § 1101(a)(42) in light of the interpretation it has been given by the BIA and the courts does not definitively mean that Congress intended to protect spouses, it does suggest, at the very least, that it was not Congress's intent to foreclose that relief.

Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations, 105th Cong., 2d Sess. (June 10, 1998).

Lin, 494 F.3d at 323 (2007) (Pet. App. 53a) (Katzmann, J., concurring in the judgment en banc). More broadly, it reveals that Congress meant to expand, not restrict, this category of asylum.

Fourth, and finally, the court below, in rejecting the spousal-eligibility rule, was unduly influenced by policy considerations not reflected in the record. Without citing any statutory language or legislative history, the court characterized as "inconceivable" any congressional intent to extend asylum eligibility to spouses because it would have "the perverse effect of creating incentives for husbands to leave their wives," *Lin*, 494 F.3d at 312 (Pet. App. 30a). Yet the court offered not a single case of a husband leaving behind his wife in order to "capitalize" on her persecution. *Id.* (Pet. App. 30a). The court further overlooked the substantial authority exercised by IJs to deny asylum on the basis of suspected fraud. Fraud in claims of asylum based on coercive family planning, like fraud in asylum cases generally, is addressed by credibility findings and an examination of the applicant's country conditions, not by policy decisions handed down by courts of appeal. *See, e.g.*, INA § 208(d)(6), 8 U.S.C. § 1158(d)(6) (permanently denying relief "[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum"). Finally, the court overlooked that extending asylum eligibility to spouses allows the spouse most capable of escaping China to seek asylum, later bringing in his or her conjugal partner under the derivative asylum provision. *See* INA § 208(b)(3), 8 U.S.C. 1158(b)(3). For all its progress, China remains a closed society; presumptive spousal eligibility provides an important

escape valve when one member of a couple targeted by the PRC's coercive population policies can escape the country but the other cannot.

In the end, by precluding the Government from giving effect to Congress's judgment that the PRC's "one couple, one child" policy targets both partners in the family unit, the court below failed to heed this Court's admonition that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citations omitted).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHI LIANG LIN, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE; Attorney General Gonzales, Respondents;

Zhen Hua Dong, Petitioner,

v.

United States Department of Justice; Attorney General Gonzales, Respondents;

Xian Zou, Petitioner,

v.

Attorney General Gonzales, Respondent.

Docket Nos. 02-4611-ag, 02-4629-ag, 03-40837-ag.

Argued: March 7, 2007.

Decided: July 16, 2007.

Before: JACOBS, Chief Judge, CALABRESI, CABRANES, STRAUB, POOLER, SACK, SOTOMAYOR, KATZMANN, PARKER, RAGGI, WESLEY, and HALL, Circuit Judges.

Judge B.D. PARKER delivered the opinion of the Court, in which JACOBS, C.J., and CABRANES, SACK, RAGGI, WESLEY, and HALL, JJ., joined.

Judge KATZMANN filed a concurring opinion, in which STRAUB, POOLER, and SOTOMAYOR, JJ., joined.

Judge SOTOMAYOR filed a concurring opinion, in which POOLER, J., joined.

Judge CALABRESI filed an opinion concurring in part and dissenting in part. B.D. PARKER, JR., Circuit Judge:

In 1997 the Board of Immigration Appeals ("BIA") held in *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A.1997) (en banc) that an individual whose spouse has been forced to abort a pregnancy, undergone involuntary sterilization, or been persecuted under a coercive population control program could automatically qualify for asylum as a "refugee" under § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") (amending 8 U.S.C. § 1101(a)(42), Immigration and Nationality Act ("INA") § 101(a)(42)). *See In re S-L-L-*, 24 I. & N. Dec. 1, 3 (B.I.A.2006) (en banc) ("In *Matter of C-Y-Z-*, ... we held that a husband whose wife was forcibly sterilized could establish past persecution under this amendment to section 101(a)(42) of the [INA]."). This appeal considers whether the BIA's interpretation of the statute was correct. We conclude it was not.

Petitioners Shi Liang Lin, Zhen Hua Dong, and Xian Zou are citizens of the People's Republic of China and unmarried partners of individuals allegedly victimized by China's coercive family planning policies. Each seeks review of an order of the BIA summarily affirming the denial of an application for asylum based, in part, on the BIA's holding in *C-Y-Z-*.[1] We remanded these petitions to the BIA to afford it the opportunity to explain its rationale in *C-Y-Z-* for reading § 601(a) to say that the spouses of those directly victimized by coercive

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[1] *See In re Shi Liang Lin*, No. A70 895 638 (B.I.A. Sept. 29, 2002), aff'g No. A70 895 638 (Immig. Ct. N.Y. City May 9, 2000); *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Sept. 25, 2002), aff'g No. A77 293 661 (Immig. Ct. N.Y. City Oct. 12, 2000); *In re Zou*, No. A77 322 595 (B.I.A. Aug. 27, 2002), aff'g No. A77 322 595 (Immig. Ct. N.Y. City Apr. 4, 2002).

family planning policies are *per se* eligible for asylum as if they were directly victimized themselves and also to clarify the status of boyfriends and fiancés under that statute. *See Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005). We retained jurisdiction. *Id.*

On remand, the BIA reaffirmed its holding in *C-Y-Z-* that spouses are entitled to automatic eligibility under § 601(a) but limited this *per se* eligibility to legally married applicants. *S-L-L-*, 24 I. & N. Dec. 1. Eschewing a text-based analysis, the BIA elected to interpret the forced abortion and sterilization clause of the section "in light of the overall purpose of the amendment" to include both parties to a marriage. *Id.* at 8. The Board reaffirmed the dismissal of the appeals of petitioners Lin, *id.*, and Dong, *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Nov. 27, 2006), and remanded Zou's petition for a determination of whether he qualified for asylum based on the "other resistance to a coercive population control program" clause in § 601(a), *In re Xian Zou*, No. A73 178 541 (B.I.A. Nov. 21, 2006).

Following the BIA's decision, we ordered rehearing en banc to consider two issues: First, whether § 601(a)'s provisions are ambiguous, so that the BIA's construction of them warrants *Chevron* deference; and second, whether the BIA reasonably construed § 601(a) to extend automatic asylum eligibility to a petitioner whose legally married spouse was subjected to an involuntary abortion or sterilization but not to a domestic partner or fiancé whose claim is derivative unless the petitioner engaged in "other resistance" to a coercive population control policy. *Lin v. U.S. Dep't of Justice*, Nos. 02-4611, 02-4629, 03-40837 (2d Cir. Nov. 13, 2006) (order) ("En banc order "). *See S-L-L-*,

24 I. & N. Dec. 1; *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

We now conclude that the BIA erred in its interpretation of 8 U.S.C. § 1101(a)(42) by failing to acknowledge language in § 601(a), viewed in the context of the statutory scheme governing entitlement to asylum, that is unambiguous and that does not extend automatic refugee status to spouses or unmarried partners of individuals § 601(a) expressly protects. Accordingly, the petition of Zhen Hua Dong is denied. The petition of Shi Liang Lin is dismissed as moot.[2] The petition of Xian Zou is dismissed for lack of jurisdiction.[3] We recognize that this decision creates a split among the circuits.[4]

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[2] Subsequent to oral arguments, we learned that Lin has had no contact with his attorneys since "early 2004," and that his attorney believes that he has either returned to China or is deceased. (Aff. of Yee Ling Poon, ¶ ¶ 3-5). Accordingly, Lin's case is moot. See 8 C.F.R. § 1208.8.

[3] We no longer have jurisdiction over Zou's petition because the BIA has remanded the case to the immigration court for further findings. *See In re Xian Zou*, No. A77 322 295 (B.I.A. Nov. 21, 2006).

[4] A number of our sister circuits have deferred to the BIA's interpretation of § 601(a). *See, e.g., Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *Huang v. Ashcroft*, 113 Fed.Appx. 695, 700 (6th Cir. 2004) (unpublished opinion); He v. Ashcroft, 328 F.3d 593, 604 (9th Cir. 2003); Li v. Ashcroft, 82 Fed.Appx. 357, 358 (5th Cir. 2003) (unpublished *per curiam* opinion). While the Third Circuit had questioned the BIA's reading of the plain language of the amendment, stating that "[i]t takes some effort to reconcile [the BIA's] interpretation with the language of the 1996 amendment, since the phrase 'a person who has been forced to abort a pregnancy or to undergo involuntary sterilization' is most naturally read as referring only to a person who has personally undergone one of those procedures," *Chen v. Ashcroft*, 381 F.3d 221, 226 (3d Cir. 2004) (Alito, J.), a divided panel of the Third Circuit recently

I. BACKGROUND

Congress has given the Attorney General the discretionary authority to grant asylum to an alien who qualifies as a "refugee" because he or she "is unable or unwilling to avail himself or herself of the protection of [his or her native country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). A showing of past persecution gives rise to a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1).

(continued...)

validated the BIA's interpretation of § 601(a) over a vigorous dissent. *See Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 108-9 (3d Cir. 2007).

The circuits are already split over whether § 601(a) provides protection for individuals who marry in traditional ceremonies not recognized by their government and later seek asylum based on the forced abortion or sterilization of their "common law spouses." The Seventh and Ninth Circuits have held that the statute covers spouses from traditional marriage ceremonies, *see Zhang*, 434 F.3d at 999; *Zhu v. Gonzales*, 465 F.3d 316, 321 (7th Cir. 2006); *Ma v. Ashcroft*, 361 F.3d 553, 559-61 (9th Cir. 2004). In contrast, the Third Circuit, in Chen, *supra*, held that the amendment does not cover unmarried partners, even when they have been prevented from marrying by their government's family planning policy. 381 F.3d at 232-34; *see also Chen v. Gonzales*, 418 F.3d 110, 111 (1st Cir. 2005) (acknowledging circuit split on the issue). While they have not reached the issue of traditional marriage ceremonies, the Fifth and Eleventh Circuits have declined to extend IIRIRA § 601 to cover boyfriends of individuals who have been subjected to a forced abortion or sterilization. *See Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004); *Wang v. U.S. Att'y Gen.*, 152 Fed.Appx. 761, 767 (11th Cir. 2005) (unpublished opinion).

In 1996, Congress passed IIRIRA § 601(a), which amended 8 U.S.C. § 1101(a)(42) by broadening its definition of "refugee," adding the following language:

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42).

The next year, the BIA held that "past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse," so that spouses of individuals directly victimized by coercive family planning policies are *per se* eligible for asylum pursuant to § 1101(a)(42). *See Matter of C-Y-Z-*, 21 I. & N. Dec 915, 917-18 (B.I.A.1997) (en banc). The BIA gave no reasons for reading the statute to compel this result.

Petitioner Lin entered the United States in January 1991 and filed an application for asylum and withholding of removal in June 1993. According to Lin's application, he had sought the required governmental permission to marry his girlfriend and have children with her, but she was too young under

Chinese law. After his girlfriend became pregnant and was forced to have an abortion, Lin left China. His girlfriend remained in China because she was too weak to travel. Following a hearing, the IJ found Lin credible, but concluded that he did not qualify for asylum based on his girlfriend's forced abortion and denied the petition. The BIA affirmed without opinion. *See In re Shi Liang Lin*, No. A70 895 638 (B.I.A. Sept. 29, 2002), aff'gNo. A70 895 638 (Immig. Ct. N.Y. City May 9, 2000).

Petitioner Dong attempted to enter the United States in October 1999, and was detained by INS officials. When the INS commenced removal proceedings, Dong requested asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). His asylum petition was based on a claim that his fiancée (who continued to reside in China) had been forced to undergo two abortions and that he would be jailed and fined for having left China illegally were he to be deported. The IJ denied Dong's petition, finding that, although he was credible, he did not qualify for refugee status as a fiancé of a woman who had undergone forced abortions, and had not established other grounds for relief. The BIA affirmed the IJ's decision. *See In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Sept. 25, 2002), aff'gNo. A77 293 661 (Immig. Ct. N.Y. City Oct. 12, 2000).

Petitioner Zou was taken into custody by the INS when he attempted to enter the United States in September 2000. After removal proceedings commenced, Zou filed for asylum. Under Chinese law, Zou and his girlfriend had been too young to marry. He claimed that she had been forced to have an abortion and he had been threatened with arrest after protesting to family planning officials. An IJ

denied the application. The IJ found Zou's testimony concerning his threatened arrest incredible, doubting that Zou would be able to evade the Chinese authorities and travel to the United States with an outstanding warrant of arrest from the Chinese government. Left only with Zou's claim that his girlfriend had undergone a forced abortion, the IJ held that Zou did not qualify for relief under § 1101(a)(42) on that basis. Zou appealed to the BIA, which affirmed the decision of the IJ. *See In re Zou*, No. A77 322 595 (B.I.A. Aug. 27, 2002), aff'gNo. A77 322 595 (Immig. Ct. N.Y. City Apr. 4, 2002). The three petitioners sought review here and the cases were heard in tandem.

Three different interpretations of the application of "refugee" status to the facts in these cases have been proposed by the parties throughout the litigation. When we heard the petitions in tandem, the Department of Justice argued that § 601(a) of IIRIRA should be understood to confer *per se* refugee status on spouses of individuals who had undergone forced abortions or involuntary sterilizations, but not to boyfriends or fiancés, who were covered, if at all, under the "other resistance" language of the amendment. Second, the petitioners argued, both before this Court and before the BIA, that the distinction between spouses and unmarried partners was arbitrary and that the statute should be interpreted to extend *per se* refugee status to the committed partners of individuals who have been forced to undergo an abortion or involuntarily sterilization.

The third, a text-based interpretation, was put forth before the BIA by the Department of Homeland Security ("DHS"), which is "charged with the administration and enforcement of ... laws relating

to the immigration and naturalization of aliens," 8 U.S.C § 1103(a)(1). In its brief to the BIA, the DHS insisted that no support existed in the statute for the BIA's automatic extension of § 601(a) to spouses. Specifically, the DHS asserted that the BIA's interpretation was "at odds with the most natural reading of the statute and with established principles of asylum law." Brief of DHS on Remand at 5, *In re S-L-L-*, 24 I. & N. Dec. 1 (B.I.A.2006) (en banc) (No. A70 895 638) ("DHS brief "). Carefully considering the text of § 601(a), the DHS concluded that a rule conferring *per se* refugee status on spouses of individuals persecuted under coercive family planning policies contradicted the unambiguous language of the amendment. Further, the DHS stated that such a rule was at odds with the legislative history of the amendment, as well as "a fundamental precept of U.S. refugee law ... that, to qualify for protection, an applicant must demonstrate that he will be targeted for his own protected belief or characteristic." DHS brief at 8-9, 11. The DHS understood that the statute required a "case-by-case" application to individuals who have not themselves been victims of a forced abortion or involuntary sterilization. Under this approach, spouses, boyfriends, and fiancés would have to demonstrate their qualification for refugee status under the "for other resistance to a coercive population control program" provision of § 601(a).

On remand, in *S-L-L-*, 24 I. & N. Dec 1, the BIA affirmed its earlier decision in *C-Y-Z-* that under § 601(a) an applicant whose spouse was forced to undergo an abortion or sterilization procedure is automatically entitled to asylum, while limiting its interpretation to individuals who were opposed to their legal spouse's abortion or sterilization. *Id.* at 4.

The BIA reasoned that § 601(a) provided "no clear or obvious answer to the scope of the protections ... to partners of persons forced to submit to an abortion or sterilization." *Id.* As a result of this perceived ambiguity, the majority chose to ground its interpretation "in the context of the history and purposes of the Act as a whole," finding that

> absent evidence that the spouse did not oppose an abortion or sterilization procedure, we interpret the forced abortion and sterilization clause of section 101(a)(42) of the Act, in light of the overall purpose of the amendment, to include both parties to a marriage.

Id. at 8. While the decision rested on "the forced abortion and sterilization clause of section 101(a)(42)," the Board noted that it was applying "general principles regarding nexus and level of harm." *Id.* at 5.

The majority based its conclusion on a number of policy-based factors, including the positions taken by the litigants and the fact that *C-Y-Z-*, as a ten-year-old decision, constituted long-standing precedent. The majority was also influenced by the shared responsibility of married couples regarding family planning decisions under Chinese law and the "profound impact" that a forced abortion or sterilization has on both parties to a marriage. *Id.* at 6-8.

The majority stopped short of extending a *per se* presumption to boyfriends, fiancés, and other unmarried partners. It concluded that they were not comparable to husbands because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." *Id.* at 9.

The BIA dismissed the appeals of Lin, *id.*, and Dong, *In re Zhen Hua Dong,* No. A77 293 661 (B.I.A. Nov. 27, 2006), and remanded Zou's case to the immigration court "for further evidence on the issues of resistance and harm" based on the "other resistance" clause of § 1101(a)(42), *In re Xian Zou,* No. A73 178 541 (B.I.A. Nov. 21, 2006).

Board Member Pauley concurred. While deferring to the BIA's prior decision in *C-Y-Z-* as long-standing and widely accepted precedent, he conceded that:

> [w]ere we writing on a clean slate, I would adopt the lately arrived at position of the Department of Homeland Security ... that whether or not the spouse of a forcibly sterilized or aborted individual can be found to have been persecuted depends on a case-by-case assessment of whether that spouse was persecuted on account of "other resistance" to a coercive population control system, because the language of the Act does not support extending refugee status to any person other than the one sterilized or aborted, aside from the "other resistance" ground.

Id. at 13 (Pauley, B.M., concurring).

Board Member Filppu, joined by Board Member Cole, concurred in the result but dissented from the majority's reaffirmation of *C-Y-Z-*. They reasoned that the language of the statute was unambiguous in "focus[ing] on 'a person' who has been forced to abort a pregnancy, not on a 'couple,' let alone a married couple...." *Id.* at 16 (Filppu, *B.M.*, concurring and dissenting). Understanding that "statutory interpretation must begin with reference to the language and structure of the statute," *id.* at 15, and

"Congress expresses its intent through the language it chooses," *id. at 19 (quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)), the dissenters concluded that an individual who has not been subjected to a forcible abortion or sterilization procedure can qualify for refugee status in relation to a coercive family planning policy only if he proves that he was persecuted or has a well-founded fear of future persecution "for other resistance to a coercive population control program." *Id.*[5]

Following the BIA's decision, we ordered an en banc rehearing to determine whether § 601(a) is ambiguous, whether the BIA's interpretation of "refugee" should be accorded Chevron deference, and "[w]hether the BIA reasonably construed IIRIRA § 601's definition of "refugee" to: (a) include a petitioner whose legally married spouse was subjected to an involuntary abortion or sterilization ...; and (b) not include a petitioner whose claim is derivatively based on any other relationship with a person who was subjected to such a procedure, unless the petitioner has engaged in 'other resistance' to a coercive population control program...." *See En banc order.* We now conclude that the BIA's interpretation of the statute is not correct.

II. DISCUSSION

When reviewing the BIA's interpretation of statutes that it administers, we apply the Chevron

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[5] While here, as throughout the opinion, we refer to a male petitioner with a wife or girlfriend who has been forced to undergo an abortion or sterilization, our reasoning applies with equal force to the perhaps more uncommon situation in which a female petitioner's male spouse or boyfriend has been forced to undergo sterilization.

principles. We first ask if Congress has spoken. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. *2778; see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). Only if the statute is silent or ambiguous do we turn to the second inquiry-whether the BIA's interpretation constitutes "a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

While the petitioners in this case are unmarried partners, and not spouses, of individuals who have been subjected to forced abortions, we review the BIA's interpretation of § 601, as articulated in its decision below, to extend a *per se* presumption of persecution to spouses, but not to non-married partners, of individuals who have been involuntarily subjected to an abortion or sterilization.[6] It is the existence of this spousal policy that the petitioners argue is an arbitrary and capricious interpretation of the statute. If the BIA's policy is at odds with the plain language of the statute, it makes little sense to

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[6] We announced our intention to reach this question in our order that this case be reheard en banc. In that order we instructed the parties to address the BIA's interpretation of § 601 as it related to both spouses and non-married partners of individuals subjected to an involuntary abortion or sterilization. All members of this en banc panel joined the order, including those who now express confusion as to why we reach the question. We are particularly perplexed by the position taken by our colleagues Judge Katzmann and Judge Sotomayor, who contend we are overreaching by considering whether the BIA's *per se* rule survives review under *Chevron* step one, but who then proceed to assess, and declare valid, the same rule under *Chevron* step two. Op. of Judge Katzmann at 324, Op. of Judge Sotomayor at 327-28 & n. 1.

consider only whether it can reasonably be limited to couples who are formally married.

Accordingly, we start our *Chevron* analysis of § 601(a) by asking whether Congress has spoken directly to the question of whether an individual can establish past persecution based solely on his spouse or partner's forced abortion or sterilization. 467 U.S. at 842-43, 104 S.Ct. 2778. In *S-L-L-*, the BIA, without elaboration or explanation, observed that "[t]here is no clear or obvious answer to the scope of the protections afforded by the amendment to partners of persons forced to submit to an abortion or sterilization." 24 I. & N. Dec. at 4. We disagree. We conclude that Congress has spoken to this issue and that it has done so unambiguously.

In the past, this Court, when following the BIA's holding in *C-Y-Z-*, has deferred to the BIA's interpretation without performing a threshold Chevron analysis of the ambiguity of the statute. *In Yuan v. U.S. Dep't of Justice*, for example, we stated of IIRIRA § 601 that, "[b]y its plain language, the law would seem to extend refugee status only to actual victims of persecution-for example, a woman who was 'forced to abort a pregnancy,' but not her husband." 416 F.3d 192, 196 (2d Cir. 2005). Despite this recognition of the amendment's plain language, we went on to defer to the interpretation of the BIA, stating that, "we have held that spouses of people actually subject to persecution under coercive family planning policies are *per se* eligible for asylum.... In doing so, however, we did not explain why. Rather, we followed the lead of the BIA." *Id.* at 196-97 (internal citation omitted); *see also Zhang v. I.N.S.*, 386 F.3d 66, 73 (2d Cir. *2004); Qiu v. Ashcroft*, 329 F.3d 140, 149 (2d Cir. 2003). To the extent that

deference implicit in these cases can be read to say that deference is due, they are overruled.

The amendment provides:

> [(1)] a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or [(2)] who has been persecuted for failure or refusal to undergo such a procedure or [(3)] for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and [(4)] a person who has a well founded fear that he or she will be forced to undergo such a procedure or [(5)] subject to persecution for such failure, refusal, or [(6)] resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42). The language of the first clause, which refers to "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization," could not be more clear in its reference to "a person," rather than "a couple," who has been subjected to a forced abortion or involuntary sterilization. This interpretation follows two cardinal rules: first that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Park N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985); and, second, that "we begin with the understanding that Congress says in a statute what it means and means in a statute what it says there," *Hartford Underwriters Ins. Co. v. Union Planters*

Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotation marks omitted).

As the statute is written, "a person who has been forced to abort a pregnancy" unambiguously refers to a woman who has been physically subjected to a forced abortion, and "a person who has been forced ... to undergo involuntary sterilization" means an individual who has physically undergone an involuntary medical procedure intended to result in infertility. Had Congress intended this clause to refer to a spouse or partner of someone who has been physically subjected to a forced procedure, "it could simply have said so." *Id.* at 7, 120 S.Ct. 1942.

Similarly, the second clause of the amendment refers to "a person" who "has been persecuted for failure or refusal to undergo [an abortion or involuntary sterilization.]" 8 U.S.C. § 1101(a)(42). Like the preceding clause, this language refers to individuals who have failed or refused to undergo (i.e., "submit to") a procedure affecting their own bodies. Under the language used by Congress, having someone else, such as one's spouse, undergo a forced procedure does not suffice to qualify an individual for refugee status.

A parallel analysis governs the categories of § 601(a) relating to the establishment of a well-founded fear of future persecution. The fourth category covers "a person who has a well founded fear that he or she will be forced to undergo [an abortion or involuntary sterilization]." This category plainly excludes an individual who does not fear that she herself will be subjected to a forced abortion or sterilization. Not only does it refer to "a person," and indicate that that person will "undergo" the procedure his- or herself, the use of the pronouns "he" and "she" reinforces the intention of Congress to

limit the application of the clause to individuals who are themselves physically forced to undergo an abortion or sterilization.

Finally, the fifth category of individuals refers to "a person who has a well founded fear that he or she will be ... subject to persecution for such failure [or] refusal [to undergo an abortion or involuntary sterilization]." Like the language of the previous clauses, this phrase is unambiguous in its reference to "a person" who fears that "he or she" will be persecuted for his or her reaction to a threat of "undergo[ing]" an abortion or sterilization to his or her own body. This section, like the previous three categories discussed, cannot be read reasonably to cover an individual's fears arising from a coercive procedure performed on someone else.[7]

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[7] No member of the en banc Court disputes this reading of IIRIRA § 601(a). Instead, our colleagues assert that *other* language in 8 U.S.C. § 1101(a)(42)-language predating adoption of the amendment-might (in the case of our colleague, Judge Calabresi) or does (in the case of our colleagues Judge Katzmann and Judge Sotomayor) somehow support the BIA's *per se* rule. These assertions are incorrect, we believe, for reasons discussed *infra*.

By contrast, the Third Circuit's recent decision in *Sun Wen Chen*, which our concurring colleagues Judge Katzmann and Judge Sotomayor cite extensively even though they apparently disagree with its analysis, asserts that § 601(a) contains an ambiguity that the BIA is empowered to fill. *See Sun Wen Chen*, at 106 ("The *C-Y-Z-* rule ... fleshes out an issue germane to the application of [§ 601(a)] that was not addressed by Congress, and so poses no *Chevron* step one problem."). *But see Sun Wen Chen*, 491 F.3d at 113 (McKee, *J.*, dissenting) ("Rather than accept the language [of § 601(a)] as drafted, the majority concludes that the absence of 'spouse' in the statute creates a vacuum that the Attorney General may rush in and fill, even though this results in amending the statute."); *id.* at 113 (McKee, *J.*, dissenting) ("Our analysis should therefore begin and end with the language of [§ 601(a)]. There is no

In *S-L-L-*, the BIA noted that it was applying "general principles regarding nexus and level of harm," 24 I. & N. Dec. at 5—principles derived from the general refugee definition subsection of § 1101(a)(42)—to reach its holding. We believe that this approach was not correct. The general definition of a "refugee" under § 1101(a)(42) permits "any person" who experiences "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" to obtain asylum. 8 U.S.C. § 1101(a)(42). Nothing in the general definition of refugee would permit "any person" who has not personally experienced persecution or a well-founded fear of future persecution on a protected ground to obtain asylum, as the BIA's *per se* rule would permit. Indeed, an examination of the overall statutory scheme reassures us that, pursuant to Chevron, we must conclude that Congress has clearly and unambiguously spoken to the issue at hand. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("In determining whether Congress has specifically addressed the question at issue [under *Chevron* step one], a reviewing court should not confine itself to examining a particular statutory provision in isolation.... A court must ... interpret the statute as a symmetrical and coherent regulatory scheme."(citation and internal quotation marks omitted)).

(continued...)

room here for a step two inquiry under *Chevron*.... I believe Congress meant what it said, and I do not assume that the omission of any reference to a 'spouse' is accidental or insignificant.").

It is apparent to us that when Congress rejected the BIA's view in *Matter of Chang*, 20 I. & N. Dec. 38 (B.I.A.1989), of birth control policies in other nations as an avenue for asylum, it did so in clear and unmistakable language. It identified those to whom asylum could be granted and reaffirmed the need for direct personal persecution. Congress's specific designation of some persons (i.e., those who fear, resist, or undergo particular medical procedures) is incompatible with the view that others (e.g., their spouses) should also be granted asylum *per se* because of birth control policies. The inclusion of some obviously results in the exclusion of others. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).[8]

The language of § 601(a) does nothing to alter the pre-IIRIRA definition of "political opinion" in § 1101(a)(42), and this further demonstrates the exclusivity of the group of persons entitled to asylum *per se* under § 601(a). Congress could have announced that the term "political opinion" included any reproductive act in violation of a coercive population control program, but instead it chose to create a specific exception to the general statutory requirement that a person claiming refugee status

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[8] Judge Katzmann contends that we have employed this well-known canon of statutory construction to conclude that IIRIRA § 601(a) restricts, rather than expands, the availability of asylum relief. Op. of Judge Katzmann at 318-19. This contention is misplaced. We acknowledge that IIRIRA § 601(a) expands the availability of asylum, but find it significant that it does so only to specifically-enumerated categories of asylum applications-categories that do not include the beneficiaries of the BIA's *per se* rule.

based on past persecution has the burden of demonstrating that the particular conduct experienced by him rose to the level of persecution and the persecution had a specified impermissible nexus. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (stating that "[t]he burden of proof is on the applicant to establish that the applicant is a refugee"). IIRIRA § 601(a) states that certain individuals affected by coercive population control programs "shall be deemed" persecuted by reason of political opinion. In using the word "deem" in this context,[9] § 601(a) makes clear that those who benefit from the amendment would not be entitled to per se political opinion asylum relief absent the amendment. In other words, their political opinion exists de jure rather than as a matter of fact on which the applicant bears the burden of proof. For an asylum applicant who does not fall within this limited exception, the burden remains on the applicant-and the opportunity remains open-to demonstrate, in light of the particular facts of the case, that he has (i) a well-founded fear of personal persecution (ii) based on political opinion or some other impermissible ground.

This is consistent with what we know: While it is plain that suffering a forced medical procedure can be a persecution if it is on account of a protected

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[9] To "deem" is "[t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it doesn't have," or, in the alternative, "[t]o consider, think, or judge." *Black's Law Dictionary* 446 (8th ed. 2004). *Black's Law Dictionary* further notes that the word deem "has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what it is.... All other uses of the word should be avoided." *Id.* (quoting G.C. Thornton, *Legislative Drafting* 99 (4th ed. 1996)).

ground, the conception of a child is no more an expression of political opinion than birth, death, sleep, or the taking of nourishment. If the language of § 601(a) indicates that the woman who is subjugated to the outrage of a forced abortion has not herself been persecuted for the "political opinion" of conceiving a child under pre-IIRIRA § 1101(a)(42), then so much less the man who has impregnated her; but unlike his wife or partner, he is not "deemed" under § 601(a) to hold a political opinion and he must prove the existence of a political opinion or other protected ground under § 1158(b)(1)(B)(i). Accordingly, we conclude that the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer. *See Sun Wen Chen*, 491 F.3d at 114, (McKee, *J.*, dissenting) ("Congress could have easily drafted [§ 601(a)] to extend to 'married couples who have been subjected to a forced abortion or involuntary sterilization.' So drafted, an actual victim of persecution under a coercive population control program, as well as his/her spouse, would qualify for relief under the statute. However, Congress did not draft the statute in this way, and we can not rewrite the statute's explicit text to achieve that result.").

Indeed, the critical defect in the BIA's policy of according *per se* refugee status to spouses of individuals explicitly protected by § 601(a) is its creation of an irrebuttable presumption of refugee status for a new class of persons. This policy effectively absolves large numbers of asylum applicants of the statutory burden to prove that they have (i) a well-founded fear of persecution (ii) based on an impermissible nexus. Such a presumption is

contrary to the text of 8 U.S.C. § 1158(b)(1)(B), which specifies that "[t]he burden of proof is on the applicant," that "the applicant must establish that ... political opinion was or will be at least one central reason for persecuting the applicant," and that an applicant's testimony may be sufficient to meet this burden only if it "refers to specific facts sufficient to demonstrate that the applicant is a refugee." The law is clear that "an agency is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found." *United Scenic Artists v. NLRB*, 762 F.2d 1027, 1034 (D.C.Cir.1985). The creation of such a presumption "is beyond the [agency's] statutory authority." *Id.* at 1035; *see also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1426-27 (9th Cir. 1987) (holding that the "BIA cannot adopt a general presumption" unfavorable to applicant but instead "must consider the specific facts and circumstances of each case"). Thus, the BIA lacks authority to adopt a policy that presumes that every person whose spouse was subjected to a forced abortion or sterilization has himself experienced persecution based on political opinion.

Our concurring colleagues Judge Katzmann and Judge Sotomayor suggest that the political nexus prong of this presumption is, in fact, inherent in Congress's 1996 amendments. Op. of Judge Katzmann at 324; op. of Judge Sotomayor at 331. However, this contention is irreconcilable with the language of § 601(a), in which Congress created this presumption for specifically identified persons-those who were themselves subjected to or threatened with a forcible abortion or sterilization. To the extent that the amendments overruled Matter of Chang's categorical rejection of such a nexus, 20 I. & N. Dec.

38, this means that an asylum applicant is no longer foreclosed from relying on evidence of a forced abortion or sterilization-whether personal or spousal-in attempting to demonstrate persecution based on political opinion. However, the fact remains that Congress has relieved only persons who actually experienced, or are threatened with, a forcible abortion or sterilization from the burden of proving a political nexus in their particular cases.

We do not deny that an individual whose spouse undergoes, or is threatened with, a forced abortion or involuntary sterilization may suffer a profound emotional loss as a partner and a potential parent. But such a loss does not change the requirement that we must follow the "ordinary meaning" of the language chosen by Congress, according to which an individual does not automatically qualify for "refugee" status on account of a coercive procedure performed on someone else. *See Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) (stressing the importance of "giving the 'words used' their 'ordinary meaning.' "); *Cardoza-Fonseca*, 480 U.S. at 453, 107 S.Ct. 1207 ("Where the language of [a] law[ ] is clear, we are not free to replace it with an unenacted legislative intent.").[10]

Under *Chevron*, once it is apparent that the statute is unambiguous, our inquiry stops. "If the intent of Congress is clear, that is the end of the matter," and we are required to refrain from deferring to an agency's contradictory interpretation. 467 U.S. at 842-43, 104 S.Ct. 2778; *see, e.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462,

[10] If this conclusion is inconsistent with Congress's intentions, it can, if it so chooses, of course, amend the statute, as it did when it adopted IIRIRA § 601(a) in response to the BIA's decision in *Matter of Chang*, 20 I. & N. Dec. 38 (B.I.A.1989).

122 S.Ct. 941, 151 L.Ed.2d 908 (2002); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160-61, 120 S.Ct. 1291; *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 500, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 226-28, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); *Cardoza-Fonseca*, 480 U.S. at 447-48, 107 S.Ct. 1207. Congress's choices of language in the phrases, "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization,""[a person] who has been persecuted for failure or refusal to undergo such a procedure," and "a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure [or] refusal," is uniformly unambiguous in its reference to an *individual* who is subjected to, or threatened with, an involuntary abortion or sterilization affecting his or her own body, and the statutory scheme of § 1101(a)(42) only reinforces that conclusion.

As a result, we conclude that the statute does not provide that a spouse-and a *fortiori*, a boyfriend or fiancé-of someone who has been forced to undergo, or is threatened with, an abortion or sterilization is automatically eligible for "refugee" status. Instead, to qualify for refugee status under the amendment, such an individual must turn to the two remaining categories of § 601(a), which provide protection to petitioners who demonstrate "other resistance to a coercive population control program" or "a well founded fear that he or she will be ... subject to persecution for such ... resistance...." 8 U.S.C. § 1101(a)(42).[11]

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[11] While no party before us argues that the rule in *S-L-L-* fails under *Chevron* step one, DHS did argue this point before the

In *S-L-L-*, the BIA was influenced by the fact that *C-Y-Z-* "is a precedent of long standing at this point ... and numerous court decisions have deferred to the holding." *S-L-L-*, 24 I. & N. Dec. at 4; *see also id.* at 14 (Pauley, B.M., concurring) ("[N]otwithstanding my belief that *Matter of C-Y-Z-*, ... was wrongly decided, I would not overrule it now, clearly a decade later and in the aftermath of thousands of decisions applying it...."). However, the Supreme Court has made clear that "[s]tare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (internal quotation marks omitted).

While *stare decisis* is undoubtedly of considerable importance to questions of statutory interpretation, the Supreme Court "ha[s] never applied stare decisis mechanically to prohibit overruling ... earlier decisions determining the meaning of statutes." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). We should not do so either. The fact that we have failed to follow the plain language of a law of Congress for ten years does not require that we do so indefinitely. That

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(continued...)

BIA, and the BIA considered and rejected the argument over a persuasive dissent by two members of the Board. In any event, we cannot defer to the Department of Justice's argument (opposed below by DHS, the agency charged with enforcing immigration laws) that the rule in *S-L-L-* survives review under *Chevron* step one if the rule finds no support in the statutory text. Accordingly, we assume that the Solicitor General will take appropriate action to recommend or assure that the views of DHS and this Court will be represented in any future proceedings.

would "place on the shoulders of Congress the burden of the Court's own error." *Girouard v. United States*, 328 U.S. 61, 70, 66 S.Ct. 826, 90 L.Ed. 1084 (1946).

Given the clarity of the statute, there is no need to resort to legislative history, which is a tool of construction that we employ only if the statutory text at issue in the context of the statute as a whole is ambiguous. However, were we to examine the statute's legislative history, we would find that our interpretation of § 601(a) comports with Congress's stated purpose in passing the amendment. The House Report accompanying the passage of the amendment states that its

> primary intent ... is to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-* ... which ... hold that a person who has been compelled to undergo an abortion or sterilization, or has been severely punished for refusal to submit to such a procedure, cannot be eligible on that basis for refugee or asylee status unless *the alien* was singled out for such treatment on account of factors such as religious belief or political opinion.

H.R. Rep. 104-469(I) at 173-74 (1996) (emphasis added).

The report mentions as examples of victims of coercive family planning policies women who have been subjected to involuntary abortions, men and women who are forcibly sterilized, and "couples with unauthorized children [who are] subjected to excessive fines," but not spouses of individuals who have been subjected to forced abortions or

sterilizations. *Id.* While Congress disapproved of coercive family planning policies as a whole, the amendment was meant to provide protection for individuals who were subjected to persecution themselves. As the report goes on to state:

> The Committee emphasizes that the burden of proof remains on the applicant, as in every other case, to establish by credible evidence that he or she has been subject to persecution-*in this case, to coercive abortion or sterilization-or has a well-founded fear of such treatment.* The Committee is aware that asylum claims based on coercive family planning are often made by entire groups of smuggled aliens, thus suggesting that at least some of the claims, if not the majority, have been "coached." *Section [601(a)] is not intended to protect persons who have not actually been subjected to coercive measures or specifically threatened with such measures ....*

Id. at 174 (emphasis added). There is nothing in the legislative history that leads us to question "the strong presumption that Congress expresses its intent through the language it chooses." *Cardoza-Fonseca*, 480 U.S. at 432 n. 12, 107 S.Ct. 1207. Here, the language Congress employed in § 601(a) demonstrates that it wanted to cover "a person," not "a couple," not a "significant other" and not an "intimate friend." Moreover, Congress's "emphasi[s]" on its intention that "the burden of proof remains on the applicant" demonstrates that no other subsection of § 1101(a)(42) could support the BIA's

interpretation of the statute.[12] *See Sun Wen Chen*, 491 F.3d at 119 (McKee, *J.*, dissenting) ("The House Report ... expresses a congressional intent to restrict asylum to the 'person' who undergoes the coercive procedure just as clearly as the text of the statute.").

This reading of the statute is further supported by the Supreme Court's pronouncement about what "refugee" means. In *INS v. Elias-Zacarias*, the Supreme Court held that under the plain language of the general refugee definition subsection of § 1101(a)(42), " 'persecution on account of ... political opinion' in [§ 1101(a)(42)] is persecution on account of *the victim's* political opinion," 502 U.S. 478, 482, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (emphasis in original), not persecution on account of a political opinion held by someone else. Similarly, a spouse who has not demonstrated that he himself is a victim of persecution cannot be entitled to asylum under this section of the statute. It would be

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[12] Judge Katzmann asserts that Congress, when it adopted IIRIRA § 601(a) in 1996, intended to accomplish the same goal as a 1993 order of former Attorney General Barr that was never enacted and never reviewed by any court. That order would have explicitly granted asylum to spouses of coercive family planning policy victims. Op. of Judge Katzmann at 320. Judge Katzmann's assertion is squarely contradicted by the plain language of IIRIRA § 601(a), which-unlike Attorney General Barr's order-does not grant asylum to spouses of persecution victims, as well as by the legislative history recounted above, which emphasizes that IIRIRA § 601(a) was not intended to make asylum available to those not explicitly protected by the amendment. Even more precarious is Judge Katzmann's reliance on the various messages he hears in the sounds of Congressional silence. Op. of Judge Katzmann at 323.

unreasonable to conclude otherwise, whether under § 601(a), or under § 1101(a)(42) as a whole.[13]

Our conclusion that Congress never intended § 601-or § 1101(a)(42)-to apply automatically to spouses is reinforced by the fact that Congress already provides for family members elsewhere in the statute by authorizing derivative asylum status for spouses and children of individuals who qualify as "refugees." 8 U.S.C. § 1158(b)(3)(A). Specifically, under § 1158(b)(3)(A), an individual whose spouse or parent has been granted asylum on the basis of having undergone or been threatened with the prospect of a forced abortion or sterilization is automatically eligible for derivative asylum: "[a] spouse or child ... of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."

What Congress did by providing in § 1158(b)(3)(A) for automatic asylum for spouses of individuals who have been granted "refugee" status as a result of having been forced to undergo an abortion or involuntary sterilization reflects a policy decision to encourage the preservation of families. Under § 1158(b)(3)(A) the benefits of asylum are extended

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[13] In her concurring opinion, Judge Sotomayor suggests that today's holding casts doubt on *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006) (remanding asylum claim to BIA on determination that a "combination of circumstances" experienced by applicant in Guatemala as a dependent child-including the massacre of close family members-"could well constitute [past] persecution" of the child). We do not address this concern because today's decision does not preclude the BIA from considering the totality of circumstances in any particular case to determine if an asylum applicant has carried his statutory burden.

first to the person Congress understood to be most deserving of protection-the direct victim. Once the victim gains asylum, so does the spouse, and so do their children. This structure encourages couples to remain together, or, in circumstances where this is not possible, facilitates reunion.

The BIA's interpretation of the statute in *S-L-L-* cuts in a different direction since it has the perverse effect of creating incentives for husbands to leave their wives. As hundreds of cases in the courts illustrate, the policy allows a married man to "capitalize on the persecution of his wife to obtain asylum even though he has left his wife behind and she might never join him and he might intend that she not do so," *Chen v. Ashcroft*, 376 F.3d 215, 223 n. 2 (3d Cir. 2004). It is highly unlikely-indeed, inconceivable-that Congress would approve of, much less intended, any of this. These counterintuitive results reinforce our conclusion that in § 601(a) Congress intended to grant automatic asylum to an individual directly victimized by a coercive birth control policy, and that no part of § 1101(a)(42) extends this automatic asylum to spouses. Congress did not, at the same time it adopted § 601(a), intend to gut or to undermine § 1158(b)(3)(A), which already contained a synchronous, sensible way of addressing the compelling problems faced by spouses and children of direct victims.

Although we conclude that Congress has spoken unambiguously to whether an asylum applicant is *per se* eligible for asylum if his spouse or partner has suffered as a result of a coercive population control program, the phrase "other resistance" is ambiguous and leaves room for the BIA's reasonable interpretation where the applicant relies on something beyond his spouse's or partner's

persecution.[14] *See Yang v. U.S. Att'y Gen.*, 418 F.3d 1198, 1203 (11th Cir. 2005) ("There is very little case law analyzing the 'other resistance' clause in the asylum statute. Additionally, a review of the legislative history behind the 1996 Amendment does not reveal any clear intent from Congress on the scope of the 'other resistance clause.' ").

In its decision, the BIA held that an applicant claiming persecution for "other resistance" must demonstrate (1) "resistance" to a coercive family planning policy, which can "cover[ ] a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law"; and (2) that the applicant has "suffered harm amounting to persecution on account of that resistance." *S-L-L-*, 24 I. & N. Dec. at 10. An individual whose spouse or partner has been subjected to a forced abortion or involuntary sterilization can therefore qualify for "refugee" status under this interpretation if that individual can prove past persecution or a fear of future persecution for "resistance" that is directly related to his or her own opposition to a coercive family planning policy.

Whatever interpretation the BIA chooses to give to the meaning of "resistance," it is clear that the fact

[14] For an analysis of what "resistance" might mean when someone has not been forcibly sterilized himself, *see Li v. Ashcroft*, 356 F.3d 1153, 1159-61 (9th Cir. 2004) (en banc) (analyzing the meaning of the "other resistance" clause and holding that it applies to a woman who announced her opposition to government population control policies and was thereafter subjected to a forced gynecological exam and threatened with future abortion, sterilization of her boyfriend, and arrest).

that an individual's spouse has been forced to have an abortion or undergo involuntary sterilization does not, on its own, constitute resistance to coercive family planning policies. *See Zhang*, 395 F.3d at 532 ("[M]erely impregnating one's *girlfriend* is not alone an act of 'resistance.' "). Nor could the resistance of an individual's spouse or partner to a family planning policy-whether by failure or refusal to undergo a procedure, or for "other resistance"-constitute, on its own, "resistance" under regulations implementing § 1101(a)(42). Instead, as the DHS has argued, "where the applicant himself has not resisted [coercive family control policies], he would need to demonstrate, though persuasive direct or circumstantial evidence, that his wife's, fiancee's, or girlfriend's resistance has been or will be imputed to *him*." *DHS brief* at 17 (citing *Singh v. INS*, 134 F.3d 962, 970 (9th Cir. 1998)). The fact that someone's spouse has been subjected to a forced abortion or sterilization would not be irrelevant to such an analysis, it simply could not provide for asylum status *per se*.[15]

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[15] Judge Calabresi asserts first that our holding conflicts-if not in actuality, then in "spirit," Op. of Judge Calabresi at 337-with the Supreme Court's recent decisions in *INS v. Orlando Ventura*, 537 U.S. 12, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (*per curiam*), and *Gonzales v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006) (*per curiam*), and second that we rush to reach a particular result. We disagree with both of these assertions. First, *Orlando Ventura* and *Thomas* held that a reviewing court should ordinarily remand rather than pass upon a matter that is (1) primarily committed to the BIA's discretion, and (2) has not yet been considered by the BIA. *See Orlando Ventura*, 537 U.S. at 16-17, 123 S.Ct. 353; *Thomas*, 126 S.Ct. at 1615. Neither of these conditions is present in this case. We, rather than the BIA, have primary authority under *Chevron* to determine whether a particular agency interpretation is consistent with the unambiguously expressed

Before turning to the dispositions of the petitioners' claims, we address some practical implications of our decision. We affirm the result of the BIA's decision in *S-L-L-* denying *per se* refugee status to boyfriends or fiancés of individuals who have been persecuted directly under coercive family planning policies. A necessary predicate for this result is our conclusion that § 601 does not confer automatic asylum eligibility on spouses, whether legal spouses or spouses from a traditional marriage, but only on individuals who themselves have undergone or been threatened with coercive birth control procedures. Thus, although none of the petitioners before us is legally married, we understand that our reading of the statute would necessarily exclude spouses of those directly victimized from per se asylum eligibility as well.

(continued...)

intent of Congress. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 447-48, 107 S.Ct. 1207.

Second, the BIA has had ample opportunity to consider the statutory interpretation question in the first instance. The *per se* rule that we now invalidate was first announced by the BIA in 1997, in its opinion in *C-Y-Z-*, 21 I. & N. Dec. at 915. In 2005, we remanded this case to the BIA to give it the opportunity to reconsider whether the rule in *C-Y-Z-* could find support in the language of § 601(a). *See Lin*, 416 F.3d at 187. On remand, DHS explicitly argued to the BIA that its *per se* rule was foreclosed by the plain language of § 601(a) and the statutory scheme. A majority of the BIA considered and rejected this argument over the forceful, and persuasive, objections of a minority of the Board. *See S-L-L-*, 24 I. & N. Dec. at 15-21 (Filppu, *B.M.*, concurring and dissenting). We see no reason to remand yet again-ping pong style-when the BIA has had ten years and several opportunities to reconsider a rule that has no basis in statutory text.

We emphasize that our holding today should not be read to presage the reopening of cases of aliens who have already been granted asylum based on the BIA's interpretation of § 601 in *C-Y-Z-*. Under 8 U.S.C. § 1158(c)(2)(A), the DHS is permitted to seek the termination of asylum when an alien no longer qualifies for refugee status "because, owing to a fundamental change in circumstances relating to the original claim, the alien's life or freedom no longer would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion *in the country from which deportation or removal was withheld.*" 8 C.F.R. § 208.24(b)(1) (emphasis added). Just as a change in United States asylum law does not qualify as a "change in circumstances" sufficient to reopen an asylum case under 8 C.F.R. § 1003.2(c)(3)(ii) (permitting motion to reopen "based on changed circumstances arising in the country of nationality or in the country to which deportation is ordered"), *see Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004), a change in the BIA's interpretation of section 601(a) as a result of our decision should not be seen as a "fundamental change in circumstances relating to the original claim" under 8 C.F.R. § 208.24(b)(1) so as to allow the termination of an asylum claim that has already been granted. *See S-L-L-*, 24 I. & N. Dec. at 21 n. 2 (Filppu, *B.M.*, concurring and dissenting) ("We are not now concerned with reopening past cases.").

III. PETITIONERS' CLAIMS

We agree with the BIA that none of the petitioners can qualify for automatic refugee status as a result of the treatment of their girlfriends or fiancées. Instead, each petitioner must demonstrate "other resistance to a coercive population control program"

or "a well founded fear that he ... will be ... subject to persecution for such ... resistance...." 8 U.S.C. § 1101(a)(42).

Petitioner Dong's application for asylum was based upon his fiancée's two forced abortions and threats from family planning officials that they would fine and sterilize Dong if his fiancée became pregnant again. But Dong failed to demonstrate that he acted in a manner that could constitute "resistance" or opposition to a coercive family control program. Nor can we find that Dong has a fear of future persecution as a result of the threat that the Chinese government would sterilize him if his fiancée became pregnant again. Dong submitted evidence to the immigration court that his fiancée had moved to Taiwan to be with her father. The IJ thus found that Dong was unlikely to return to China, and his fear of sterilization was conjectural. Moreover, as the BIA notes, were Dong's fiancée to return to China, Dong and his fiancée would now meet the age requirements for marriage. *See In re Dong*, A. 77 293 661 (B.I.A. Nov. 27, 2006). In addition, the immigration judge correctly determined that Dong did not demonstrate that he would "more likely than not" be persecuted as grounds for a withholding of removal, or that he would be subjected to torture within the meaning of the Convention Against Torture. *See id.* Accordingly, we deny Dong's petition for review.

Petitioner Lin's claim for asylum is that he and his girlfriend were refused permission to marry or have a child out of wedlock, and his girlfriend was forced to undergo an abortion. Lin did not claim before the immigration court, the BIA, or this Court that he had "otherwise resisted" China's coercive family planning policies. Even if he had, we agree

with the BIA that a request, through the appropriate legal channels, for permission to have a child, combined with the subsequent abortion performed on his girlfriend, does not constitute "resistance to a coercive population control program." *S-L-L-*, 24 I. & N. at 10-12. However, we do not have jurisdiction over Lin's petition for review, as we find that his petition is moot. Lin's attorney has informed this Court that he has never had any contact with the petitioner, and that Lin's prior attorney has not spoken to him in approximately three years. In addition, an individual from Lin's village in China has told the attorney that "he heard from other villagers that Lin was terminally ill and had returned to China not too long ago and died." Aff. of Yee Ling Poon ¶ 5. When the possibility of relief is "so remote and speculative that any decision on the merits ... would amount to a 'declar[ation of] principles or rules of law which cannot affect the matter in issue in the case before [us],' " *United States v. Blackburn*, 461 F.3d 259, 262 (2d Cir. 2006) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895) (alterations in original)), we would run afoul of Article III were we to decide the claim. Given that we do not retain jurisdiction over Lin's claim if he has returned to China and has provided no explanation to overcome the presumption that his asylum application has been abandoned, *see* 8 C.F.R. § 1208.8, or if he is deceased, Lin's petition is dismissed as moot.

Petitioner Zou's petition has been remanded by the BIA to the immigration court to review its findings of adverse credibility and determine whether Zou qualifies as a refugee for "resistance" to a coercive family planning policy. *See In re Xian Zou*, No. A77 322 295 (B.I.A. Nov. 21, 2006).

Accordingly, we no longer have jurisdiction over Zou's petition. *See* 8 U.S.C. § 1252(a)(1) (giving courts of appeals jurisdiction to review only final orders of removal).

CONCLUSION

For these reasons, the petition for review of Zhen Hua Dong is **DENIED**. The petitions for review of Shi Liang Lin and Xian Zou are **DISMISSED** for lack of jurisdiction.

KATZMANN, Circuit Judge, with whom Judges STRAUB, POOLER, and SOTOMAYOR join, concurring in the judgment:

With the majority's emphasis on denying asylum relief to legal spouses under § 101(a)(42) of the Immigration and Nationality Act (the "INA"), it is easy to lose sight of one fact central to the disposition of these cases: Not one of the petitioners in these consolidated cases was married. In each case, it was the plaintiff's girlfriend, not his wife, who was forced to abort her pregnancy. It is thus unnecessary for us to resolve whether the BIA can legally extend asylum relief to legal spouses; indeed, in doing so, we are addressing not only an issue not presently before us, but also one that the parties in these cases do not even dispute. In their briefs before us, both the petitioners and the Government agree that the statute is ambiguous.[16] The question

[16] The Department of Homeland Security ("DHS") advanced a different view before the BIA. The majority "assume[s] that the Solicitor General will take appropriate action to recommend or assure that the views of DHS and this Court will be represented in any future proceedings." Maj. Op. at 310 n. 11. In so doing, the majority ignores the historic independence of the Office of the Solicitor General in determining the executive branch's position before the Supreme Court. When agencies of the executive branch have taken inconsistent positions, as they have here, the Solicitor General may choose among those

the parties dispute, and the only one that these cases require us to answer, is whether the BIA's interpretation of the statute as applied to boyfriends and fiancés is reasonable. Every judge on this Court who reaches this issue agrees that it is.

Thus, this case could have been resolved simply and nearly unanimously by assuming the reasonableness of the BIA's construction of the statute as applied to legal spouses and then holding that it was also reasonable as applied to boyfriends and fiancés. *See Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 227 (3d Cir. 2004) (Alito, J.) (assuming "for the sake of argument" that "C-Y-Z-'s interpretation is permissible" as applied to legal spouses and then determining whether the BIA was reasonable in distinguishing "between married and unmarried couples"). Instead, the majority has gone out of its way to create a circuit split where none need exist, *see* Maj. Op. at 300 n. 4, thereby frustrating the BIA's uniform enforcement of a national immigration policy.[17] Finding in textual silence an expression of unambiguous congressional intent, the

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positions, or it may adopt any other available litigation position. The Solicitor General has no obligation to endorse the preferred legal theory of the court below. To the extent the majority attempts to influence the position the Solicitor General will take in future proceedings, that effort is inappropriate.

[17] In a related context, we remanded to the BIA to address the proper scope of the term "refugee" in the first instance, noting that "it would be unsound for each of the several Courts of Appeals to elaborate a potentially nonuniform body of law" and describing uniformity as "especially desirable in cases such as these." *Jian Hui Shao v. BIA*, 465 F.3d 497, 502 (2d Cir. 2006).

majority has rejected the BIA's determination that § 101(a)(42) is ambiguous.

When a governmental body with substantial experience in interpreting a complex statutory scheme concludes that a statute is ambiguous, that determination should give us pause. Here, the fact that the BIA concluded that the INA is ambiguous with respect to the question we are called upon to answer suggests that we would do well to probe further, to consider whether the seemingly plain language belies a more complicated meaning. It suggests that we should consider carefully not only the text of the statute, but also the context-both the events that gave rise to that text and the various agency and judicial responses to it. Text without context can lead to confusion and misunderstanding. The majority's analysis is testament to that proposition. [18]

In answering the first of the questions set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), that is, whether "the statute is silent or ambiguous with respect to the specific issue," *id.* at 843, 104 S.Ct. 2778, we must look to the text of § 101(a)(42) of the INA. That text provides, in pertinent part, that a refugee is any person who is outside any country of such person's nationality ...

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[18] The majority finds my decision to engage in this analysis "perplex[ing]" given my belief that we need not-and should not-answer today a question that this case does not require us to answer and the proper resolution of which the parties do not dispute. Although I believe we should have limited our decision to the BIA's treatment of boyfriends, the majority has nonetheless chosen to address its treatment of husbands. I would be remiss if I did not discuss both why I believe the majority's discussion of this issue is unnecessary and also why I believe it is wrong.

and who is unable or unwilling to return to ... that country because of persecution ... on account of ... political opinion.... For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization ... shall be deemed to have been persecuted on account of political opinion....

8 U.S.C. § 1101(a)(42). The majority focuses its textual analysis on the final sentence of that provision, that is, § 601(a) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), concluding that the BIA's decision "rested on" that sentence, and not the general definition of "refugee" in 8 U.S.C. § 1101(a)(42). Maj. Op. at 302-03. Yet, as the majority notes, the BIA found that " '[t]here is no clear or obvious answer to the scope of the protections afforded by the amendment to partners of persons forced to submit to an abortion or sterilization.' " Maj. Op. at 304.[19]

[19] Although we remanded to the BIA to "more precisely explain its rationale for construing IIRIRA § 601(a)" to protect spouses, *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005), nothing in that decision precluded the BIA from looking to the more general language in the statute in determining whether to extend relief to spouses. Indeed, the BIA had the authority to interpret the meaning of 8 U.S.C. § 1101(a)(42) independent of our remand in *Lin.See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) ("The Attorney General ... has vested the BIA with power to exercise the discretion and authority conferred upon the Attorney General by law in the course of considering and determining cases before it. Based on this allocation of authority, we [have] recognized ... that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication ...." (quotation marks and citation omitted)); *see also Kuhali v. Reno*, 266 F.3d 93, 102 (2d Cir. 2001) (granting "*Chevron* deference to the Board's construction of the INA, which it ... administer[s]").

Reasoning that the "lack of ... a reference" to spouses in the 1996 amendment "does not necessarily preclude an applicant from demonstrating past persecution based on harm inflicted on a spouse when both spouses are harmed by government acts motivated by a couple's shared protected characteristic," the Board looked to the "general principles regarding nexus and level of harm" for guidance. *In re S-L-L-*, 24 I. & N. Dec. 1, 5 (B.I.A. 2006); *see also id.* at 5 n. 5 (citing to the general regulatory framework that defines when an applicant may qualify as a refugee); *id.* at 6 (considering the "well-established principles regarding nexus and level of harm for past persecution").

Thus, although the majority places great emphasis on its view that the "language in § 601(a) ... is unambiguous and ... does not extend automatic refugee status to spouses or unmarried partners of individuals § 601(a) expressly protects," Maj. Op. at 300, I find the focus on the amendment misplaced. I believe we must look instead to the entirety of 8 U.S.C. § 1101(a)(42) to determine whether the statute is ambiguous. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575 91 L.Ed. 1995 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").[20] That section provides

[20] Even if the BIA construed only the 1996 amendment, it would still be necessary to consider the text of the entire statute and the context against which that amendment was enacted to determine whether the 1996 amendment is itself ambiguous within the meaning of *Chevron*. *See Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 198 (2d Cir. 2004) ("In interpreting the plain language of the statute, we must look to

that a "refugee" is any individual who cannot return to his or her home country because of "persecution ... on account of ... political opinion." None of these terms is defined in any way, and none explicitly addresses whether the spouses of those who have been forced to undergo an abortion or sterilization are entitled to asylum relief.[21] Hence, the statute, on its face, does not "directly address[ ] the precise question at issue." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778; *cf. Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 106 (3d Cir.2007) ("[T]he *C-Y-Z-* rule thus fleshes out an issue germane to the application of § 1101(a)(42)(B) that was not addressed by Congress, and so poses no *Chevron* step one problem.").

Indeed, the majority points to no language in the statute that explicitly denies asylum relief to these spouses, or that precludes the BIA from extending it to them. *Cf.* 8 U.S.C. § 1101(a)(42) (explicitly precluding from the definition of "refugee" individuals "who ordered, incited, assisted, or otherwise participated in the persecution of any

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the particular statutory language at issue, as well as the language and design of the statute as a whole, and, where appropriate, its legislative history." (quotation marks omitted)). Because I believe the BIA held that the entire provision was ambiguous, it is not necessary to determine here whether the 1996 amendment alone is ambiguous. Thus, contrary to Judge Calabresi's suggestion, Judge Calabresi Op. at 343 n. 6, I do not necessarily agree that the BIA could not have relied on § 601(a) to provide asylum relief to spouses.

[21] I agree with Judge Calabresi that this "general language" in 8 U.S.C. § 1101(a)(42) means that the BIA, with its expertise in this area, is particularly well-suited to exercise its discretion and decide how that language should be interpreted. Judge Calabresi Op. at 338. Judge Calabresi and I differ as to whether the BIA has already exercised that discretion.

person on account of race, religion, nationality, membership in a particular social group, or political opinion"). Rather, the majority takes the position that "Congress's specific designation of some persons (i.e., those who fear, resist, or undergo particular medical procedures) is incompatible with the view that others (e.g., their spouses) should also be granted asylum *per se* because of birth control policies. The inclusion of some obviously results in the exclusion of others." Maj. Op. at 306-07. But where the majority reads the language of the 1996 amendment and sees it as a limitation on the availability of asylum relief, I see it, in the context in which it was enacted, as an expansion of that relief.

I believe one question is fundamental: What was Congress's purpose in enacting the 1996 amendment? *Cf. Ai Feng Yuan v. U.S. Dep't of Justice*, 416 F.3d 192, 197 (2d Cir. 2005) (noting the "canon of statutory construction that requires us to reconcile a statute's plain language with its purpose"). In answering that question, we should not limit our inquiry to the language of the amendment; instead, we must look at the statutory scheme of which that amendment is a part and the legislative activity that led to its enactment. Congress's intent in enacting IIRIRA § 601(a) was to clarify that, contrary to the BIA's prior rulings, the imposition of some aspects of China's family planning policy can constitute persecution on the basis of political opinion, and that certain victims of that persecution are entitled to protection under our asylum laws. Nothing in the amendment suggests that Congress intended to prevent the BIA from extending relief to victims other than those explicitly identified in the amendment. *See Sun Wen Chen*, 491 F.3d at 109 ("We are not convinced that

Congress, in expanding asylum to include more reproductive rights-based claims, intended to define the outer limits of relief in such cases."). There is thus some irony in the majority's approach: By giving short shrift to context, it infers an intent to limit the availability of asylum relief; had it looked more closely at context, it would have recognized Congress's intent was only to expand that relief.[22] Context makes clear what text alone fails to convey.

The INA provides asylum relief to individuals who have been "persecut[ed] ... on account of ... political opinion," but does not define those terms. In *Matter of Chang*, 20 I. & N. Dec. 38 (B.I.A.1989), the BIA held that whatever else "persecution" might mean, it did not encompass any retribution visited upon individuals who violated China's "one couple, one child" policy. The BIA ruled that the policy "is [not] on its face persecutive" and does not "persecut [e] any portion of the Chinese citizenry on account of one of the reasons enumerated in section 101(a)(42)(A) of the Act." *Id.* at 43, 44.

Others in the executive branch took a different view. The next year, the Department of Justice

[22] The majority's recognition that § 601(a) expanded the availability of asylum relief does nothing to explain why this language, which by its terms only expands relief, should also be read to have limited the BIA's preexisting authority to further expand it. Although the majority suggests that I rely on "messages [I] hear[ ] in the sounds of Congressional silence," Maj. Op. at 311 n. 12, all that I actually find in silence, especially given the context, is ambiguity. *See Chevron*, 467 U.S. at 843, 104 S.Ct. 2778 (noting that we turn to *Chevron* step two "if the statute is silent or ambiguous with respect to the specific issue"); *see also Sun Wen Chen*, 491 F.3d at 105 ("*Chevron* deference embodies the judgment that agencies, rather than courts, ought to serve as gap-fillers in situations of statutory silence."). It is the majority that appears to find in silence clear evidence of Congress's intent.

issued "interpretative rules and general statements of policy for establishing statutory eligibility for asylum or withholding of deportation on the basis of political opinion for aliens who express a fear of coercive population control policies in their homeland." Refugee Status, Withholding of Deportation and Asylum; Burden of Proof, 55 Fed.Reg. 2803, 2804 (Jan. 29, 1990).[23] President George H.W. Bush reaffirmed his Administration's support of the interim rule with the promulgation of Executive Order 12,711, which provided for "enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization." Exec. Order No. 12,711, 55 Fed.Reg. 13,897, 13,897 (Apr. 11, 1990).

Although the INS, in July 1990, set forth a final rule that did not address this issue, *see* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed.Reg. 30,674 (July 27, 1990), the Office of the General Counsel of the INS

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[23] These amendments to the asylum regulations appear to contemplate the possibility that asylum relief would be available to the spouses of those who were subject to forced abortion or sterilization. *See Refugee Status*, 55 Fed.Reg. at 2805 (to be codified at 8 C.F.R. § 208.5(b)(2)) ("An applicant who establishes that the applicant (or applicant's spouse) has refused to abort a pregnancy or to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required to abort the pregnancy or to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum."); *see also id.* (to be codified at 8 C.F.R. § 242.17(c)) ("Eligibility for withholding of deportation on account of political opinion is established by the respondent who establishes that he or she (or respondent's spouse) will be required to abort a pregnancy or to be sterilized....").

subsequently sent a letter to Regional and District Counsel stating that "Department of Justice and INS 'policy with respect to aliens claiming asylum or withholding of deportation based upon coercive family planning policies is that the application of such coercive policies does constitute persecution on account of political opinion.' " *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 740 (2d Cir. 1995), *superseded by* 8 U.S.C. § 1101(a)(42) (quoting INS letter to Regional and District Counsel).

In January 1993, Attorney General William P. Barr signed a final rule that would have made this view law. It provided, in pertinent part, that "[a]n applicant (and the applicant's spouse, if also an applicant) shall be found to be a refugee on the basis of past persecution on account of political opinion if the applicant establishes that, pursuant to the implementation ... of a family planning policy ... the applicant has been forced to abort a pregnancy or to undergo sterilization or has been persecuted for failure or refusal to do so." AG Order No. 1659-93, at 14 (Jan. 15, 1993) (to be codified at 8 C.F.R. 208) ("January 1993 Rule"). Although this rule was sent to the Federal Register, where it was made available for public inspection and scheduled for publication, it was never published due to the change in presidential administrations. *Xin-Chang Zhang*, 55 F.3d at 741. In February, additional regulations pertaining to asylum were published, but these made no mention of the January rule. *Id.*

Against the background of these conflicting BIA decisions and administrative regulations, we were asked to determine whether asylum relief was available to victims of China's family planning policy. We held that such relief was not available, explaining that "[e]ven were we to accept [the] view

that the 'administrative cacophony' surrounding the issue justified diminished deference to *Chang*, our result would not change. It is difficult to frame a result different from the holding of *Chang* that would be 'reasonable' under both *Elias-Zacarias* and the existing immigration laws." *Id.* at 752; *see also INS v. Elias-Zacarias*, 502 U.S. 478, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). We did not stop there, however. Instead, we called upon Congress and the President to determine whether relief should be available to the victims of China's family planning policy: "No doubt, the President and the Congress acting together have power to create an exception to the existing immigration laws for PRC citizens...." *Id.*

The next year, Congress enacted IIRIRA § 601(a). The House Committee Report explained that Congress's "primary intent" in amending the definition of refugee was "to overturn several decisions of the [BIA], principally *Matter of Chang and Matter of G-*," H.R.Rep. No. 104-469(I), 1996 WL 168955, at *173 (1996), in which the BIA had held that "the Chinese Government's implementation of its family planning policies is not on its face persecutive and does not by itself create a well-founded fear of persecution on account of one of the five grounds delineated in the Act, even to the extent that involuntary sterilization may occur," *Matter of G-*, 20 I. & N. Dec. 764, 778 (B.I.A.1993); *Matter of Chang*, 20 I. & N. Dec. at 43-44; *see also Junshao Zhang v. Gonzales*, 434 F.3d 993, 995 (7th Cir. 2006) ("The impact of that amendment was to overrule Chang, and allow for the granting of asylum applications in cases in which the claim of persecution stemmed from the enforcement of China's coercive population control policies.");

H.R.Rep. No. 104-469(I), 1996 WL 168955, at *174 (criticizing the BIA decisions for "effectively preclud[ing] from protection persons who have been submitted to undeniable and grotesque violations of fundamental human rights"); *id.* (noting that "the BIA's rationale for these opinions-that policies of coercive family planning are 'laws of general application' motivated by concerns over population growth, and thus are not 'persecutory'-is unduly restrictive").[24]

When Congress stated that "[f]or purposes of determinations under this [Act], a person who has been forced to abort a pregnancy or to undergo involuntary sterilization ... shall be deemed to have been persecuted on account of political opinion," 8 U.S.C. § 1101(a)(42)(a), it was not providing an exhaustive list of those who could claim asylum relief because they were victimized by China's family planning policy. Rather, it was expressing a congressional determination that, contrary to the BIA's prior rulings, China's "one couple, one child" policy is on its face persecutory, and victims of that policy who experienced persecution should be able to qualify for asylum relief without making an additional showing of their own political opinion.

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[24] As previously noted, Attorney General Barr had attempted to "supersede the [BIA] decision in *Matter of Chang*," January 1993 Rule, at 4-5, but his efforts fell victim to a change in presidential administrations. *See Xin-Chang Zhang*, 55 F.3d at 741. Noting that the next administration had thus far failed to take action, Congress stepped in to accomplish the same goal through legislation. *See* H.R.Rep. No. 104-469(I), 1996 WL 168955, at *174 ("[T]he Administration, which has the authority to overrule the BIA decisions through regulation or through decision of the Attorney General, has not done so. Nor has it offered adequate relief to persons who have undergone such coercion.").

The majority takes the position that § 601(a) does not "alter the pre-IIRIRA definition of 'political opinion' in § 1101(a)(42)" and that, for the individuals identified in § 601(a), "their political opinion exists *de jure* rather than as a matter of fact on which the applicant bears the burden of proof." Maj. Op. at 307, 308. It notes, in this regard, that the amendment provides that those who have been subjected to forced procedures " 'shall be deemed' persecuted by reason of political opinion," Maj. Op. at 307, and that "[t]o 'deem' is '[t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it doesn't have,' " Maj. Op. at 307 n. 9 (quoting *Black's Law Dictionary* 446 (8th ed. 2004)). But, as the majority acknowledges, there is more than one definition of the word "deem"; it may also mean "[t]o consider, think, or judge." *Black's Law Dictionary* 446 (8th ed. 2004). Thus, in this context, Congress's use of the word "deemed" may mean that these individuals should be "judged" as having been persecuted on account of political opinion, just as the proposed 1993 rule provided that these applicants "shall be found to be ... refugee[s] on the basis of past persecution on account of political opinion." January 1993 Rule, at 14.[25] Indeed, the legislative history

[25] That two definitions of the term exist suggests, at the very least, that there is ambiguity in Congress's use of the term, and the fact that *Black's Law Dictionary* may favor one definition is hardly sufficient to dispel that ambiguity. Indeed, although *Black's Law Dictionary* may describe the majority's preferred usage as the more "traditional[ ]" one and may discourage other uses, the word "deem" has long been used to mean "consider, think, or judge." *See, e.g.*, U.S. Const. art. V ("The Congress, whenever two thirds of both Houses shall *deem* it necessary, shall propose Amendments to this Constitution ...." (emphasis added)); 15 U.S.C. § 80b-3(j) ("The Commission is authorized to adopt rules, regulations, and orders ... as it *deems* appropriate to implement this subsection."(emphasis added)).

suggests that Congress was not attempting to create an exception to *Matter of Chang*, but to overrule it; and if Congress were attempting to carve out an exception to the normal requirement that applicants must establish that they have faced persecution on account of one of the protected grounds, it could have done so in much plainer language. In any event, the statute is, at a minimum, ambiguous, and it is the BIA, not the courts, that is charged with construing the statute in the face of that ambiguity.

Other circuits to have considered this issue have held that when Congress enacted the 1996 amendment it intended to protect both members of couples that are targeted under China's family

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Indeed, Congress has repeatedly used the term "deem" in the INA itself to mean "consider, think, or judge." *See, e.g.*, 8 U.S.C. § 1101(a)(27)(J)(i) (defining the term "special immigrant" to include "an immigrant who is present in the United States ... who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment" (emphasis added)); *id.* § 1103(a)(3) (providing that the Secretary of Homeland Security may "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter" (emphasis added)). A "normal rule of statutory construction" provides that "identical words used in different parts of the same act are intended to have the same meaning." *Beharry v. Ashcroft*, 329 F.3d 51, 61 (2d Cir. 2003) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (quotation marks omitted)). Even if this rule does not conclusively resolve any ambiguity created by the existence of the two definitions, Congress's use of the allegedly disfavored definition elsewhere in the INA renders the meaning of "deemed" in § 1101(a)(42), at the very least, ambiguous.

planning policy. *See, e.g., Junshao Zhang*, 434 F.3d at 999 ("Congress passed § 601(a)(1) of the IIRIRA to ensure that families who are victims of forced abortion and sterilization under China's population control policy would receive asylum ...." (emphasis added)); *Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (identifying "Congress's goal in passing the amendments-to provide relief for '*couples*' persecuted on account of an 'unauthorized' pregnancy and to keep *families* together" (emphasis added)). We need not go as far as these courts to affirm the BIA's decision here. Even if Congress did not specifically intend to protect "couples," there is nothing in the text of the amendment, or the context that gave rise to it, that indicates that it intended to preclude the BIA from extending asylum relief to both members of a couple. *See Sun Wen Chen*, at 109 (granting *Chevron* deference to the BIA's interpretation in *In re* S-L-L-).[26]

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[26] Although "[g]eneral language of a statutory provision ... will not be held to apply to a matter specifically dealt with in another part of the same enactment," *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932), that rule has no applicability here where the specific provision does not address whether spouses should be entitled to relief. In the 1996 amendment, Congress identified a particular category of individuals entitled to relief, but left to the BIA the task of determining whether to expand upon that relief, just as the BIA routinely defines what individuals are entitled to asylum relief in a myriad of other contexts.

Indeed, there is some language in the legislative history which suggests that Congress may have considered the possibility that individuals other than those who had been forced to undergo an abortion or sterilization might qualify for asylum. The House Committee Report on the amendment noted that "[d]etermining ... whether the actual or threatened harm rises to the level of persecution is a difficult and complex task, but no more so in the case of claims based on coercive family planning than in cases based on other factual situations. Asylum officers

Just as nothing in the language or history of the amendment indicates a congressional intent to foreclose the extension of relief to spouses, Congress has done nothing to indicate such an intent in the years since the amendment's enactment, notwithstanding that the BIA interpreted § 1101(a)(42) to cover spouses a decade ago and numerous courts of appeals have upheld this interpretation as reasonable. *See, e.g., Yuan*, 416 F.3d at 197; Junshao Zhang, 434 F.3d at 999; *Kui Rong Ma*, 361 F.3d at 559 ("The BIA and the courts have uniformly applied the statute's protections to husbands whose wives have undergone abortions or sterilization procedures, as well as to the wives themselves."); *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918-19 (B.I.A.1997) (en banc). There are obscure areas of public policy, largely hidden from public attention and concern, in which it makes little sense to ascribe meaning to the absence of congressional response to administrative and judicial interpretations of a statute. Immigration is hardly one of those areas. To the contrary, immigration-and the issue of the appropriate scope of asylum relief-have consistently been on Congress's radar. Immigration is frequently in the news, and Congress has repeatedly legislated in this area. Indeed, as recently as 2005, Congress revisited this very provision and removed the annual

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and immigration judges are capable of making such judgments." H.R.Rep. No. 104-469(I), 1996 WL 168955, at *174. If only those subjected to the procedures could claim asylum relief, immigration judges and the BIA would never have needed to consider whether an applicant's harm rises to the level of persecution, given that the amendment explicitly provides that a forced abortion or sterilization does rise to this level.

cap on the number of asylees who could be admitted under it. *See* REAL ID Act of 2005, Pub.L. No. 109-13, Div. B, § § 101(g)(2), (h)(5), 119 Stat. 231, 305-06 (May 11, 2005). While the fact that Congress, in the course of its active attention to immigration issues and legislation, has not amended 8 U.S.C. § 1101(a)(42) in light of the interpretation it has been given by the BIA and the courts does not definitively mean that Congress intended to protect spouses, it does suggest, at the very least, that it was not Congress's intent to foreclose that relief.

The majority nonetheless holds that it was "not correct" for the BIA to construe the general definition of "refugee" to allow for the provision of this relief because "the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer." Maj. Op. at 307-08. I agree that an individual must have personally experienced persecution to be entitled to asylum relief, but that statement begs the question of what constitutes persecution.

The statute does not, in either the 1996 amendment or in its general definition of the term "refugee," prescribe exactly how much harm or what kind of harm an individual must experience to have been "persecuted" within the meaning of the statute. *See Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 340 (2d Cir. 2006) (noting that the term "persecution" is "not defined by the Immigration and Nationality Act"); *see also Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A.1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A.1987) (defining persecution as "either a threat to the life or freedom of, *or the infliction of*

suffering or harm upon, those who differ in a way regarded as offensive" (emphasis added)); *see also Ivanishvili*, 433 F.3d at 341 (acknowledging the BIA's definition of "persecution" as "the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground."). The 1996 amendment states that when one is forced to undergo an abortion or sterilization, the harm thereby experienced is sufficient to qualify for asylum, but it hardly makes that level of harm necessary.

The majority may view the 1996 amendment as providing that only individuals who have undergone a forced abortion or sterilization have experienced "persecution." If so, we again differ on our interpretation of the significance of the 1996 amendment. I believe Congress enacted the 1996 amendment not primarily to define the term "persecution," but to clarify what it means to be persecuted "on account of political opinion." As noted above, Congress sought to make clear, contrary to the BIA's earlier decision in *Matter of Chang*, that the imposition of penalties through the implementation of China's family planning policy can constitute persecution "on account of political opinion" by effectively adopting the position taken in the commentary to the 1993 rule that, "[a]lthough ... prosecution and punishment under a law of general applicability will not ordinarily constitute persecution 'on account of' one of the statutory grounds, ... [p]ersecution on account of political opinion encompasses persecution of people whose violation of laws may not be motivated by their political opinions but is regarded by the state as political disloyalty." January 1993 Rule, at 8.

Thus, I do not think that § 601(a) unambiguously defines the term persecution, and the majority has pointed to nothing in the statute that suggests that the emotional and psychological harm one suffers when one's spouse is forced to undergo an abortion or sterilization is not severe enough to constitute persecution. Nor does anything in the statute preclude the BIA from considering the effect that China's family planning policies may have on a couple's shared right to reproduce and raise children. Because Congress did not specifically address these issues, the statute is ambiguous. It therefore falls to the BIA to determine whether the harm an individual experiences when his or her spouse is subjected to a forced abortion or sterilization is sufficient to constitute persecution. *See, e.g., Kuhali*, 266 F.3d at 102 (granting "*Chevron* deference to the Board's construction of the INA, which it ... administer[s]"); *cf. Sun Wen Chen*, 491 F.3d at 107 (noting that the BIA "exercised its delegated gap-filling authority reasonably" when it recognized the harms an individual experiences as a result of the forced abortion or sterilization of his spouse). By holding that persecution cannot encompass such individuals, the majority, as Judge Sotomayor cogently explains, usurps the BIA's task of giving meaning to ambiguous statutory terms. Further, by suggesting that the BIA is creating a presumption which allows individuals to be granted asylum without proving that they were "persecuted ... on account of political opinion," the majority errs. The BIA here created no presumption; rather, fulfilling a basic responsibility, it simply discerned the meaning of those ambiguous terms.[27]

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[27] The majority's assertion that § 601" relieve[s] ... persons who actually experienced a forcible abortion or sterilization from the

Finally, the majority finds support for its reading of the statute in its perception that there is some tension between this rule and the provision of derivative asylum status for spouses of individuals who qualify as "refugees." Maj. Op. at 312-15. But in adopting this rule, the BIA provided a basis by which individuals could claim asylum relief in their own right for harm they suffered as a result of their spouses' forced abortion or sterilization. There is no apparent tension in providing derivative asylum status to spouses who have not themselves suffered any harm and providing an additional basis of relief to those spouses who have, that is, those who have themselves suffered harm when their partners were subjected to a forced abortion or sterilization. *See* 8 U.S.C. § 1158(b)(3)(A) (providing derivative asylum to spouses who are "not otherwise eligible for asylum under this section"); *cf. Junshao Zhang*, 434 F.3d at 1001 (noting that "it would be particularly perverse for courts to treat a subsequent break-up of the marriage as somehow lessening the impact of [the prior] persecution [of the husband]"). Because there is no tension in providing these two separate,

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burden of proving a political nexus" is similarly problematic. Maj. Op. at 308-09. In my view, Congress did not relieve anyone of the burden of proving political nexus. Rather, it determined that an applicant can meet this burden by establishing proof of persecution pursuant to a coercive family planning policy. Given the majority's agreement that any asylum applicant may "rely[ ] on evidence of a forced abortion or sterilization-*whether personal or spousal*-in attempting to demonstrate persecution based on political opinion," Maj. Op. at 309 (emphasis added), I fail to see what additional evidence an applicant whose spouse was subjected to a forced abortion or sterilization would have to show to carry his burden of proving political nexus.

distinct forms of relief, it does not seem to me that the availability of derivative asylum relief unambiguously precludes the BIA from providing an additional basis of relief to those whose spouses have been subjected to a forced abortion or sterilization. *See Sun Wen Chen*, at 105 ("We ... do not believe that the existence of derivative asylum status under a statute implies that Congress intended to foreclose additional pathways to asylum specific to spouses.").

At bottom, the majority seems to be motivated by a concern that the BIA's rule will "gut or ... undermine" the availability of derivative asylum relief or have "the perverse effect of creating incentives for husbands to leave their wives." Maj. Op. at 312. But nothing in the BIA's rule denies relief of any kind to husbands who come to this country with their wives; moreover I think it very likely that husbands will find it advantageous to come with their wives when possible because doing so will buttress the credibility of their claims. In the end, however, my views of the policy consequences of the BIA rule are immaterial; so, too, are those of the majority. Once we determine that the statute is ambiguous, we must defer to the BIA's interpretation of the statute if it is reasonable, whatever our own personal policy preferences. *See, e.g., Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965) ("To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."(quotation marks omitted)).

In considering the reasonableness of the BIA's interpretation under step two of Chevron, our charge is not to determine whether the BIA's interpretation

of the statute is the one we would have adopted in the first instance. Instead, "the question for the court is whether the agency's answer is based on a permissible construction of the statute"; we must defer to "legislative regulations ... unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843, 844, 104 S.Ct. 2778. Here, in determining whether to extend asylum relief to spouses, the BIA reasonably considered the general principles underlying the definition of persecution and concluded that a husband is persecuted "when the government forces an abortion on a married couple." *In re S-L-L-*, 24 I. & N. Dec. at 6; see also *id.* ("When the government intervenes in the private affairs of a married couple to force an abortion or sterilization, it persecutes the married couple as an entity."). I see no reason why the BIA could not reasonably conclude that one has suffered harm or injury sufficiently severe to constitute persecution when one's spouse is forced to undergo an abortion or sterilization. Indeed, this determination finds support in the decisions of a number of courts that have explicitly recognized that non-physical harm may support a finding of past persecution in at least some circumstances. *See Junshao Zhang*, 434 F.3d at 1001 (rejecting explicitly the "notion that [a husband] suffers no persecution independent of his wife, as the result of the forcible abortion of his child" and holding that "[a]lthough his wife was certainly a very direct victim of China's population control measures, Zhang was a victim as well. The forcible abortion has deprived him of his unborn child, of the ability to realize the family that his wife and he had desired, and forever deprived him of the ability to become a parent to that unborn son or daughter with his wife"); *see also Ouk v.*

Gonzales, 464 F.3d 108, 111 (1st Cir. 2006) (noting that "[u]nder the right set of circumstances, a finding of past persecution might rest on a showing of psychological harm" (quotation marks omitted)); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) ("Persecution may be emotional or psychological, as well as physical."); *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (holding that the applicant was entitled to asylum "based on her fear that her daughter will be forced to undergo female genital mutilation" because her "fear of ... being forced to witness the pain and suffering of her daughter is well-founded").

The BIA also determined that there were not "convincing reasons to extend the nexus and level of harm attributed to a husband who was opposed to his wife's forced abortion to a boyfriend or fiancé." *In re S-L-L-*, 24 I. & N. Dec. at 9.[28] Recognizing that "marriage place[s] the husband in a distinctly different position from that of an unmarried father," *id.*, the BIA noted that unmarried fathers do not bear the same legal and societal responsibility for violations of family planning policies. Indeed, because their relationships with their partners are not registered with the government and may not even be known within the community, the government may often be unaware of their

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[28] Because petitioner Dong, the only petitioner whose claim we address on this appeal, had not participated in a traditional marriage ceremony, I need not determine now whether the BIA's rule would also be reasonable as applied to individuals who were not old enough to marry under Chinese law and who participated in such a ceremony. Compare *Junshao Zhang*, 434 F.3d at 999 (holding that the BIA rule is unreasonable in this context), and *Kui Rong Ma*, 361 F.3d at 560 (same), with *Cai Luan Chen*, 381 F.3d at 231 (holding that the BIA rule is reasonable).

identities. *See id.* at 9-10. The BIA thus presumed that the family planning officials target legal spouses for persecution to a greater extent than boyfriends and fiancés. *See id.* Furthermore, "[p]roof or presumption of paternity ... may be considerably more difficult when a boyfriend claims to have fathered a child who was forcibly aborted by government officials." *Id.* at 10. Although, as the BIA itself acknowledges, "drawing the line at marriage is not" perfect, *id.* at 9, and reasonable policymakers could differ as to how to draw the line, I cannot say that, under the deferential standard which guides us, the BIA's reading is not based on a permissible construction of the statute. *See Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.[29] If Congress disagrees with the BIA's interpretation, it can overturn the decision.[30]

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[29] Because petitioner Dong was not married and has not otherwise established his eligibility for asylum relief, I agree with the majority that his petition for review should be denied. I also agree that the petitions of Lin and Zou should be dismissed.

[30] The BIA, too, remains free to revisit its decision. Although Judge Calabresi suggests that my approach "preclude[s] the agency from thinking deeply and fully about the matter," Judge Calabresi Op. at 343, I do not understand why this would be so. Unlike the majority, I do not purport to offer an authoritative constructive of 8 U.S.C. § 1101(a)(42); I would hold only that the statute is ambiguous and that the BIA's interpretation is reasonable. As Judge Calabresi elsewhere acknowledges, *id.* at 335, the BIA may always change its own interpretation of statutory law, so long as the change is not inconsistent with that law. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("For if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency."(quotation marks omitted)).

This case presents difficult and challenging questions at the heart of our immigration laws. How we respond will affect the hopes and dreams of human beings seeking to live in freedom. In enacting the INA, Congress established a framework for determining when asylum relief should be provided to such individuals, and in doing so, it delegated considerable authority to the BIA to fill in statutory gaps and define the broad language used in the INA. It is in situations such as these that we should be particularly mindful of the views of the agency charged by Congress with administering the statute, views that will reflect the agency's considerable experience and expertise. We should recognize that in such circumstances what is advanced as the obvious answer may not be the right one. Here, the meaning of the text becomes much less clear when one examines context, and the BIA, recognizing that ambiguity, has offered a reasonable interpretation of the statute. I would defer to that interpretation.

SOTOMAYOR, Circuit Judge, with whom Judge POOLER joins, concurring in the judgment:

Today's decision marks an extraordinary and unwarranted departure from our longstanding principles of deference and judicial restraint. Instead of answering the limited question before us-whether the BIA's denial of asylum to the unmarried partners of women forced to undergo abortions or sterilization was unreasonable-the majority has chosen to go far beyond it to address an issue that is unbriefed, unargued, and unnecessary to resolve this appeal. Indeed, the cases before us, which involve only unmarried petitioners, are inappropriate vehicles through which to opine on the merits of the BIA's position with respect to spouses under 8 U.S.C.

§ 1101(a)(42).[31] *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."); *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (declining to reach question which received little or no attention from the parties and noting "prudence dictates that we not decide this question based on such scant argumentation"). Moreover, as Judge Katzmann's concurrence, in which I fully join, cogently notes, today's holding simply ignores the context animating § 601's enactment and further upends congressional intent by reading the statute too narrowly. Section 601 was, after all, expressly enacted to *expand*, not contract, the availability of asylum under § 1101(a)(42) in the context of coercive population control programs.

I will not reiterate what Judge Katzmann has already ably stated. I write separately to highlight the potentially ill-considered breadth of the majority opinion, which appears to cast doubt on our own circuit's caselaw, as well as to create further circuit

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[31] The majority claims to be perplexed by my concern that today's decision reaches a question it need not, particularly because, the majority reasons, all judges-including myself-who agreed to hear these cases *en banc* joined an order instructing "the parties to address the BIA's interpretation of § 601 as it related to both spouses and non-married partners." Maj. Op. at 304 n. 6. My concern, however, is not a quibble over the semantics of the *en banc* order, but rather the majority's unnecessary but apparently pressing need to decide a question which the facts of petitioners' appeals simply do not present. Like Judge Katzmann, I engage the question the majority answers because I would be remiss in not voicing my profound disagreement with the majority's conclusions.

conflicts when such outcomes are easily avoided. Most importantly, however, I write because the majority's zeal in reaching a question not before us requires the unprecedented step of constricting the BIA's congressionally delegated powers-a decision whose ramifications we are ill-prepared, given the procedural posture of this case, to understand or appreciate fully.

The majority analyzes § 601 within the broader framework of the INA and concludes that "[n]othing in the general definition of refugee would permit 'any person' who has *not personally* experienced persecution or a well-founded fear of future persecution ... to obtain asylum." Maj. Op. at 306-07. Again, I agree fully with Judge Katzmann's discussion of the fatal flaws in this analysis, and I seek only to emphasize the majority's apparent failure to appreciate that this deceptively simple proposition may unduly and inappropriately limit the BIA not merely in cases under § 601 but in others as well.

In coming to its conclusion, the majority endorses the view that "persecution" can only be direct and personal, by which it appears to mean that the granting of asylum can never be based on, in whole or in part, harm to others, no matter how closely related the harm or the person harmed is to the applicant or whether harm to another is directed in whole or in part toward the applicant.[32] The

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[32] In another portion of the majority opinion, the Court states "we conclude that the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer." Maj. Op. at 307-08. By this pronouncement, the opinion suggests that harm to others cannot form a part of the rationale for granting asylum.

majority tries to anchor this limiting principle to the text of the statute, but such a reading is unwarranted and unsupportable. It is pellucidly clear from the text of § 1101(a)(42) that Congress did not define nor intend to define "persecution" to exclude harms "not personally" suffered by an applicant. The statute instead reads that "any person" who "because of persecution or a well-founded fear of persecution" is "unable or unwilling" to return to his or her country is entitled to asylum. There is no indication whatsoever of how personal or direct the harm or injury must be, only that persecution to an individual can merit asylum protection.[33] We should, moreover, eschew the limiting construction of § 601 and § 1101(a)(42) urged in today's opinion because such a construction could lead to absurd results. *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000) ("A statute should be interpreted in a way that avoids absurd results."). If government officials shot and killed an asylum applicant's child to force him or her to convert to another religion, would that harm, which the majority would ostensibly label "not personal," be insufficient in itself to demonstrate persecution of that applicant? Or what if the parent of an adult applicant was kidnapped and tortured to force the applicant to renounce an opposition political party or endorse a government candidate? In the end, I see no unambiguous language in the text of § 1101(a)(42) that compels the limiting construction of the INA that the majority now divines.

Requiring an applicant's eligibility for asylum to rest only on instances where he or she suffers

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[33] I further agree with Judge Katzmann's analysis of the majority's misplaced reliance on 8 U.S.C. § 1158 to support its conclusion here.

persecution "personally" merely begs the question of what personal harm is and how to define it. As with any ambiguous statutory term, it is for the BIA to determine within its expertise what exactly constitutes "persecution" so long as its interpretation is reasonable.[34] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). From its decision in *In re S-L-L-*, 24 I. & N. Dec. 1 (B.I.A.2006), the BIA clearly construed "persecution" as not only entailing the spouse forced to undergo the procedure but also including the other spouse who, while physically unharmed, was nevertheless also targeted by the government for punishment and persecution. The BIA reached this conclusion by utilizing its traditional tests of nexus and level of harm, *id.* at 5, that is, by examining how the procedure affected each spouse's respective health and emotional well-being as well as the couple's interest in procreation and child-rearing. Perhaps most importantly of all, the BIA also considered to whom the government's actions were directed.

It is this last factor that is crucial. The majority concedes that both spouses suffer a "profound emotional loss" as a result of a forced abortion or sterilization, but it never sufficiently explains why

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[34] I note that this and other circuits have found "persecution" to be an ambiguous term in other asylum cases. *See, e.g., Mirzoyan v. Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006) (*per curiam*) (finding that the INA does not "unambiguously explain[ ] what the word 'persecution' means" in the economic context); *Corado v. Ashcroft*, 384 F.3d 945, 947 (8th Cir. 2004) (*per curiam*) ("The BIA is entitled to deference in interpreting ambiguous statutory terms such as 'persecution.' "); *cf. Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (noting that the INA "does not define 'persecution' or specify what acts constitute persecution").

the harm of sterilization or abortion constitutes persecution only for the person who is forced to undergo such a procedure and not for that person's spouse as well. Maj. Op. at 308-09. This conclusion rests on two principal conclusions, both equally flawed. First, the majority clings to the notion that the persecution suffered is physically visited upon only one spouse, but this simply ignores the question of whom exactly the government was seeking to persecute when it acted. On this point, the harm is clearly directed at the couple who dared to continue an unauthorized pregnancy in hopes of enlarging the family unit. Indeed, the majority's conclusion disregards the immutable fact that a desired pregnancy in a country with a coercive population control program necessarily requires both spouses to occur, and that the state's interference with this fundamental right "may have subtle, far reaching and devastating effects" for both husband and wife. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). The termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child. Similarly, as to sterilization, the Ninth Circuit has aptly observed that:

> In addition to the physical and psychological trauma that is common to many forms of persecution, sterilization involves drastic and emotionally painful consequences that are unending: The couple is forever denied a pro-creative life together. As the BIA explained,

The act of forced sterilization should not be viewed as a discrete onetime act, comparable to a term in

prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.

Qili Qu v. Gonzales, 399 F.3d 1195, 1202 (9th Cir. 2005) (quoting *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B.I.A.2003)). Viewed in this light, the harm here is directed as much at the husband as at the wife. By its action, after all, the state is preventing both members of the couple from procreating as a unit, and as the BIA found in *In re Y-T-L-*, such harm is not limited in time to the moment of sterilization, but is an ongoing harm that affects a married couple indefinitely. 23 I. & N. Dec. at 607. As the Third Circuit recently observed in *Sun Wen Chen v. Attorney General of the United States*, 491 F.3d 100, 107 (3d Cir. 2007), the "persecution of one spouse can be one of the most potent and cruel ways of hurting the other spouse." [35] In the end, I fail to

[35] The majority incorrectly asserts that the Third Circuit's analysis in Sun Wen Chen is incongruent with my own analysis because the court there held that § 601(a) contains an ambiguity. Maj. Op. at 306 n. 7. The Third Circuit found that § 601(a) is ambivalent on the treatment of spouses and that the existence of derivative asylum was not "intended to foreclose additional pathways to asylum specific to spouses." *Sun Wen Chen*, 491 F.3d 100, 105 (emphasis added); see also *id.* ("[W]e see nothing in the statute evincing Congressional intent to establish a particular policy regarding spousal eligibility."). The Third Circuit then reasoned that because § 601(a) "establishes that forced abortion and sterilization constitute persecution," *id.*, it is entirely within the BIA's authority to "interpret[ ] the scope of that persecution," *id.*, including its applicability to spouses. It is my contention that we should defer to the BIA's interpretation regarding the broader scope of persecution under § 1101(a)(42) and not impose, as the

understand how the majority can claim that the harm caused by a spouse's forced abortion or sterilization is not a personal harm to both spouses-either or both of whom can be sterilized for violations of the population control programs-especially given the unique biological nature of pregnancy and special reverence every civilization has accorded to child-rearing and parenthood in marriage. I similarly fail to understand how the majority justifies limiting the BIA's ability to take this special and egregious harm into consideration and to determine within its expertise that such acts constitute persecution against both a wife and husband.[36]

(continued...)

majority here does, an unfounded requirement that persecution be direct and personal and that harm to another, even if directed at the applicant, is never sufficient for the purposes of § 1101(a)(42). These analyses are not incongruent because they both center on the deference we owe to the BIA on defining persecution.

[36] The majority notes that its decision corrects the "perverse effect of creating incentives for husbands to leave their wives" inherent in the BIA's determination in *In re S-L-L-*, 24 I. & N. Dec. 1 (B.I.A.2006). Maj. Op. at 312. I note first that one of the petitioners before us was not, in fact, attempting to flee alone; he and his fiancée planned to leave China together but she was unfortunately caught before she could escape. More importantly, however, the majority's assertion here is based on nothing but speculation as to the decisionmaking in which couples, persecuted by coercive population control programs, must engage before attempting to flee. We simply have no foundation on which to conclude that all couples have the financial resources to escape at the same time, and as the government stated at oral argument, it is not uncommon for Chinese couples to separate and have one spouse go abroad in order to amass the necessary resources to bring over the other spouse. I believe the majority here is opining on a subject-

Second, the majority argues that the BIA has impermissibly created an irrebuttable presumption that relieves applicants from the statutory burden of proving that they have a well-founded fear of persecution based on an impermissible nexus. As Judge Katzmann correctly observes, however, the presumption argument is merely a red herring. In enacting § 601, Congress was not creating a presumption but merely expanding the BIA's unduly restrictive definition in *Matter of Chang* of the terms "persecution" and "political opinion." Thus, § 601 defined "persecution" and "political opinion" to include an individual's forced abortion or sterilization under a restrictive population control policy. No presumption was created, however, as the applicant still bears the burden of establishing that he or she was subject to the conduct that qualifies under this expanded definition of persecution. And, while the majority places great weight on the fact that § 601 supposedly creates a presumption that "relieved only persons who actually experienced a forcible abortion or sterilization from the burden of proving a political nexus," and not those married to such persons, Maj. Op. at 309, his conclusion ignores the clear congressional intent of § 601, expressed in the legislative history, that

> [n]othing in [§ 601] is intended to lower the evidentiary burden of proof for any alien, no matter how serious the nature of the claim. The Committee emphasizes that the burden of proof remains on the applicant, as in every

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imbued with potentially significant cultural differences-with which it has no expertise or empirical evidence.

> other case, to establish by credible evidence that he or she has been subject to persecution-in this case, to coercive abortion or sterilization-or has a well-founded fear of such treatment.

H.R. Rep. No. 104-469(I), 1996 WL 168955, at *174 (1996). Quite simply, there is no way to read in § 601 the presumption the majority discusses, nor a limitation on the BIA in extending § 601's reach to spouses. Either the persecution occurred or it did not, and the applicant retains the burden of proving such circumstances. The BIA accordingly did not err in interpreting ambiguous terms in the INA to determine that either spouse may qualify as a refugee where one of them has in fact undergone forced abortion or sterilization.

Finally, if adopted, the majority's limiting construction may have significant, unintended consequences, broader than the Court today acknowledges. By claiming categorically that an applicant cannot rely on the harm inflicted on others in § 601 cases-no matter how closely related the harm or the person harmed is to the applicant or whether the harm is directed in whole or in part towards the applicant-to establish persecution or entitlement to asylum, this Court suggests that the BIA is precluded from *ever* considering harm to others as evidence of persecution to the applicant. While I agree that there are certainly limits as to when harm to another may inform persecution or a well-founded fear of persecution of an applicant, I cannot endorse the majority's apparent *per se* conclusion. As noted above, this is a question of statutory construction properly answered by the BIA, which, in its administrative expertise, may interpret the ambiguity inherent in "persecution" to

determine when a harm is direct or personal enough to be considered persecution of an applicant. And, in certain limited contexts pertinent to this appeal, the BIA has done precisely this, examining the harm to family members in determining whether an asylum applicant has in fact suffered past persecution, particularly where an immediate family member has been subjected to significant and enduring mistreatment. In *Matter of Chen*, 20 I. & N. Dec. 16, 19-21 (B.I.A.1989), the seminal BIA decision recognizing the availability of humanitarian asylum for victims of severe past persecution, the BIA recited a litany of horrific acts visited on and suffered by Chen's parents during the Cultural Revolution, and such evidence-when coupled with the Chinese government's treatment of the petitioner himself-supported the BIA's conclusion that "the respondent has clearly established that he and his family were severely persecuted in the past in China." *Id.* at 21. Similarly, in *In re H-*, 21 I. & N. Dec. 337, 345 (B.I.A.1996), where an applicant had testified about the severe physical beatings he had suffered as the member of a subclan in Somalia, the BIA based its finding of past persecution in part on the applicant's testimony that his father and brother, also members of the same subclan, were beaten and killed. In examining the allegations concerning the deaths of his father and brother, the BIA specifically noted that "evidence of treatment of persons similarly situated is persuasive of an applicant's claim of political persecution." *Id.* at 345 (quoting *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A.1987)); see also *In re N-M-A-*, 22 I. & N. Dec. 312, 326 (B.I.A.1998) (finding in the context of humanitarian asylum that the applicant had suffered past persecution in part because of "the

disappearance and likely death of his father"). The BIA has thus identified specific situations in which the harm to close family members could be central to the finding of persecution and the granting of refugee status. The majority's misguided exercise in statutory interpretation, however, undermines this agency determination and suggests that because the years-long harassment and egregious mistreatment of Chen's parents or the deaths of H-'s brother and father were "not personally experienced" by the applicants, neither Chen nor Hcould base their asylum applications on such harm after today's decision.[37]

The holding today also calls into question our own caselaw-as well that of other circuits-in which appellate panels have recognized that harm inflicted upon one individual may give rise to, or at least help establish, persecution of another in certain circumstances. In *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006) (*per curiam*), this Court, acknowledging that petitioner had not been "victimized directly" when as a young boy, his sister and her family were killed for their political activities, nevertheless remanded the case to the BIA for further proceedings to determine whether his age, coupled with the harm to his family

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[37] The regulations governing the claims under the Convention Against Torture explicitly recognize that torture encompasses not only physical harm to the individual but also "mental pain or suffering" that results from the threat of infliction of physical pain or suffering on another person. *See* 8 C.F.R. § 1208.18(a)(4)(iv). By analogy, this regulation further supports the position that persecution is not limited to direct and physical harm upon an individual but can encompass harm inflicted on others as well. *See, e.g., Yan Chen v. Gonzales*, 417 F.3d 268, 275 (2d Cir. 2005) ("Certainly ... torture can constitute persecution....").

members, helped to establish past persecution.[38] *Id.* at 150 (internal quotation marks omitted). While the decision rested in great part on the petitioner's age, this decision illustrates another category of asylum cases where it might be appropriate to consider harm to others in determining past persecution.[39] Similarly, other circuits have confronted situations where they found persecution relying in whole or in part on harm to others in certain circumstances. In *Sun Wen Chen*, the Third Circuit upheld *In re S-L-L-*, the very BIA determination the majority strikes down today, in part by acknowledging that the physical harm to one's spouse is nevertheless harm to both spouses in the family planning context. 491 F.3d 100, 107 ("In

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[38] The passing statement in a footnote in *Melgar de Torres v. Reno*, 191 F.3d 307, 313 n. 2 (2d Cir. 1999), that the death of the applicant's uncle did not constitute political persecution of her is not to the contrary. As noted in *Jorge-Tzoc*, the petitioner in *Melgar de Torre* "was an adult who offered no objective evidence that her uncle's killing was politically motivated." 435 F.3d at 150. To the extent that *Melgar de Torres* suggested, furthermore, that even if the petitioner had established the link between her uncle's killing and his political activities, such killing could then not be considered part of her past persecution, this suggestion was clearly dicta.

[39] The majority professes no opinion on the continued vitality of our holding in *Jorge-Tzoc* and claims that nothing in today's decision "preclude[s] the BIA from considering the totality of circumstances in any particular case to determine if an asylum applicant has carried his statutory burden." Maj. Op. at 311-12 n. 13. Yet, the majority fails to explain why the totality of circumstances may not be applied in the context of married couples who suffer under coercive population control programs. If the BIA could consider the direct harm to Jorge-Tzoc's family members in determining whether Jorge-Tzoc himself had been persecuted, it should be able to consider the targeting of and effect on an individual when his or her spouse is forced to undergo an abortion or sterilization.

a great many cases, forced abortion or involuntary sterilization of one spouse will directly affect the reproductive opportunities of the other spouse.... And persecution of one spouse can be one of the most potent and cruel ways of hurting the other spouse...."). The Sixth Circuit in *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004), determined that an applicant was entitled to asylum because she had fled Ethiopia with her teenage daughter to protect the teenager from undergoing forced genital mutilation. The *Abay* court specifically noted that derivative asylum under § 1158 was not available to Abay-as she was neither a spouse nor a child of a persecuted individual-but granted her asylum, observing that several oral IJ and BIA decisions "suggest a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm." *Id.* at 642.

Having carefully weighed the law and arguments presented in this appeal, I must concur in the judgment for the reasons already stated ably by Judge Katzmann. I agree in particular with Judge Katzmann that the Third Circuit in *Cai Luan Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004) (Alito, J.), did what we should have done here. In that case, then-Judge Alito found no need to reach the question of whether § 601 or § 1101(a)(42) were ambiguous because Chen, who was not married to his fiancée on whom the forced abortion was performed, could prevail only if the BIA's distinction between married and unmarried couples was unreasonable.[40] *Id.* at

[40] While I ultimately agree with Third Circuit's recent pronouncement in *Sun Wen Chen* that the BIA properly

227. Judge Alito ultimately ruled that the distinction was reasonable and denied the petition. *Id.* at 235. This analysis should control our own very similar cases here.[41]

Given the above, the majority should never have reached the question it has taken upon itself to resolve, particularly in the immigration context where the Supreme Court has long recognized "that judicial deference to the Executive Branch is especially appropriate ... where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988)). In reaching this question, the majority has, I fear, started a domino effect that may have significant and unforeseen repercussions. Finally, the majority, in noting that "[i]f this conclusion is inconsistent with Congress's intentions, [Congress] can, if it so chooses, of course, amend the statute," Maj. Op. at 309 n. 10, seems to take comfort that its

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interpreted an ambiguity in § 601 and § 1101(a)(42) to extend asylum protection to spouses of individuals forced to abort pregnancies or undergo sterilization, *Sun Wen Chen* involves a question we need not reach here because the petitioner here is not married. Had the majority dealt only with the question presented, I would adopt the approach as outlined by then-Judge Alito in *Cai Luan Chen*.

[41] Unlike my esteemed colleague Judge Calabresi, I do not find that the BIA limited its analysis to § 601 in *In re S-L-L-*, but rather was grounding its interpretation in both the specific language of § 601 and the more general definition of "refugee" in § 1101(a)(42). Because the statute is ambiguous, I would defer to the BIA's interpretation here.

conclusion, if wrong, may be simply overturned. But for those petitioners who fled a draconian population control program because their spouses had been forced to undergo an abortion or sterilization, the majority's caveat must be cold comfort indeed.

CALABRESI, Circuit Judge, concurring in part and dissenting in part:

What is remarkable about this case is that essentially everyone on this court agrees that IIRIRA § 601(a), *codified* at 8 U.S.C. § 1101(a)(42)(B), cannot be read to grant *per se* asylum to spouses. This is remarkable because it is in direct conflict with every other circuit, the BIA, and ten years of rulings. *See* Maj. Op. at 300 & n. 4. Yet we all agree. And we are correct. Moreover, it follows that, because § 601(a) does not grant that kind of asylum to spouses, it also cannot be read as granting asylum to non-spouses-like the petitioners in this case. This part of the majority's analysis is admirable, and I join it.

Because § 601(a), in unambiguous terms, grants *per se* "refugee" status only to the "person who has been forced to abort a pregnancy or to undergo involuntary sterilization," the panel in this case-consisting of the author of the majority opinion, the principal concurrence, and me-sent the case back to the BIA, to allow the agency to reexamine its decision in *In re C-Y-Z-(C-Y-Z-),* 21 I. & N. Dec. 915 (B.I.A.1997) (en banc) (construing § 601 as granting *per se* "refugee" status to spouses). The BIA stuck to its decision, see *In re S-L-L-(S-L-L-),* 24 I. & N. Dec. 1 (B.I.A.2006) (en banc), but has not convinced us that *C-Y-Z-*'s rule can be squared with the plain text of § 601(a), and so we now appropriately say that the BIA was wrong.

Unfortunately, both the majority and concurrences are not willing to stop with that, which was the issue clearly before us and fully considered by the BIA. For reasons that are quite understandable, but nonetheless wrong-both in terms of results and in terms of what the Supreme Court has said about our relationship to the BIA-the majority and the concurrences go further. They do so in different directions, and that fact is, to me, simply additional evidence that going further was inappropriate.

I

The majority says that if the BIA were to construe the general definition of "refugee" found in 8 U.S.C. § 1101(a)(42)(A) as granting *per se* refugee status to certain categories of people-e.g., spouses or non-spouses-that would be an impermissible reading of § 1101(a)(42)(A). This seems to me to be mistaken on several counts.

A

First, the majority relies on the fact that § 601(a) was enacted to overturn *Matter of Chang*, 20 I. & N. Dec. 38, 44 (B.I.A.1989) (adopting the rule that victims of a coercive family planning regime could claim refugee status only if the victims demonstrated that the family-planning policy had been "selectively applied" to them on the basis of a protected ground). *See* Maj. Op. at 306-07. The majority posits that § 601(a) was not intended to do more than overturn Chang, and that Chang is therefore left in place as to spouses and partners who are not themselves forcibly aborted or involuntarily sterilized. *See* Maj. Op. at 307 ("The inclusion of some obviously results in the exclusion of others."). And, under *Chang*, spouses and partners are not entitled to *per se* refugee status.

Fair enough, but Chang is not an opinion of the Supreme Court, or even of a Court of Appeals; it is an interpretation of underlying statutory law *by the BIA*. As such, the agency is perfectly free to change it-so long as the change is not inconsistent with the underlying law. Thus, any suggestion that the BIA could not, because of *Chang*, now grant *per se* status to spouses pursuant to § 1101(a)(42)(A) is a *non sequitur*, plain and simple.

B

Second, the logical consequences of what the majority seems to be saying appear to me to be untenable. Suppose the BIA were to issue an interpretation of § 1101(a)(42)(A) that said, categorically, that any child who sees his parents tortured and murdered before him by a totalitarian government-say, the Nazis-is persecuted, and therefore eligible for asylum. Would such a ruling be invalid under § 1101(a)(42)(A)'s broad definition of refugee? If that is what the majority is saying, it is, in my judgment, manifestly absurd. There is nothing in the language or history of § 1101(a)(42)(A) that suggests the BIA could not adopt such a *per se* rule.

But, if the BIA *could* adopt the kind of *per se* rule I described above-and I believe a majority of our court would agree with me that such a rule would indeed be proper-then it is improperly premature to say-as today's governing opinion does-that the agency could not adopt an analogous *per se* rule with respect to individuals in the situation of the petitioners in this case. It may be that if the BIA did adopt such a *per se* rule, I would ultimately agree with the majority that, in the context of coercive family planning laws, such an interpretation of § 1101(a)(42)(A) is "unreasonable" at *Chevron*'s Step

Two.[42] But once it is admitted that some categorical *per se* asylum rules-like the one involving my hypothetical children-might be valid under § 1101(a)(42)(A) (i.e., would get by *Chevron* Step One)-it is, I believe, impermissible to say that an equivalent *per se* interpretation dealing with spouses *would necessarily* be invalid if it *were* adopted-which is in effect what the majority's holding amounts to. It is impermissible given the Supreme Court's unanimous decisions in *INS v. Orlando Ventura*, 537 U.S. 12, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (per curiam), and *Gonzales v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006) (per curiam).

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In *Ventura*, the Supreme Court held that, "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." 537 U.S. at 16, 123 S.Ct. 353. "This principle," the Court explained, "has obvious importance in the immigration context," *id.* at 16-17, 123 S.Ct. 353, because "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question." *Id.* at 16, 123 S.Ct. 353. Subsequent case law has only strengthened *Ventura's* reasoning. The "ordinary remand rule" was recently reaffirmed by a unanimous Supreme Court in *Thomas*, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358, and has been followed by our court in a series of cases, most notably in *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 168-70 (2d Cir. 2006). Yet, despite the "obvious importance" of the ordinary

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[42] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

remand rule in the immigration context, the majority insists on precluding the BIA from interpreting § 1101(a)(42)(A)'s general provisions in the first instance. In my view, this aspect of the majority's holding is dangerously in tension with *Ventura's* command.

In *Ventura*-much as in the case before us-the Ninth Circuit reversed a holding of the BIA, and then "went on to consider an alternative argument that the Government had made before the Immigration Judge," but which "the BIA itself had not considered...."537 U.S. at 13, 123 S.Ct. 353. Specifically, the Ninth Circuit reversed the BIA's holding that the petitioner was not persecuted "on account of" a "political opinion," but then, rather than remanding to the BIA for further proceedings, the court evaluated for itself, and rejected, the government's alternative argument that the petitioner failed to qualify for asylum because of changed country conditions in Guatemala. *Id.* In reversing the Ninth Circuit's judgment, the Supreme Court found that the court of appeals seriously disregarded the agency's legally-mandated role. Instead, it independently created potentially far-reaching legal precedent about ... a highly complex and sensitive matter. And it did so without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise. *Id.* at 17, 123 S.Ct. 353.

More recently, the Court in *Thomas* reversed a Ninth Circuit decision which had decided, without first remanding the issue to the BIA, "that in principle 'a family may constitute a social group for the purposes of the refugee statutes,'... [and] that the particular family at issue ... fell within the scope of the statutory term 'particular social group.' " 126

S.Ct. at 1614 (quoting *Thomas v. Gonzales*, 409 F.3d 1177, 1187, 1189 (9th Cir. 2005) (en banc)) (emphasis added). Quoting *Ventura*-and echoing the basic principle of *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), that "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency," *id.* at 88, 63 S.Ct. 454-the *Thomas* Court reiterated that "[a] court of appeals is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Thomas*, 126 S.Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16, 123 S.Ct. 353 (internal quotation marks omitted)).

In *Ucelo-Gomez*, a panel of this court concluded that *Thomas* and *Ventura* establish the rule that "where (as here) the agency has yet to decide whether a group, a thing, or a situation falls within the ambit of a statutory term, the proper course is for the reviewing court to remand the matter to the agency in accordance with the well-worn ordinary remand rule." *Ucelo-Gomez*, 464 F.3d at 169 (internal quotation marks omitted). Moreover, the panel in Ucelo-Gomez asserted that "the agency interpretation required by *Thomas* and *Ventura* is 'in the first instance' a particularized interpretation by the agency." *Id.* (emphasis omitted).

As a purely formal matter, the approach taken by the majority today is perhaps reconcilable with *Ventura* and *Thomas*. But it is fundamentally incompatible with the spirit of those cases. Even if the majority is convinced that *C-Y-Z-*'s rule would be an unreasonable construction of § 1101(a)(42)(A), the correct approach would be to allow the agency to make a determination on that matter first. Instead,

the majority opinion-perhaps realizing that it could not, at this time, authoritatively speak on the question of *C-Y-Z-*'s reasonableness as a construction of § 1101(a)(42)(A)-by a preemptive strike strips the BIA of its capacity to consider the issue under § 1101(a)(42)(A). In so doing, the majority precludes the BIA from examining thoroughly this "highly complex and sensitive matter," *Ventura*, 537 U.S. at 17, 123 S.Ct. 353, and "independently create [s] ... far-reaching legal precedent .... without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise." *Id.* Significantly, *Ventura* and *Thomas* are designed to prevent just such judicial preemption of BIA positions, even when that preemption reaches what is arguably the correct result.

Moreover, even if the majority were not required-as I believe it was-to remand Zhen Hua Dong's case to the BIA,[43] it should have remanded his case as a

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[43] The question of whether, as a matter of *Chevron* Step Two "reasonableness" review, the BIA could base its *C-Y-Z-* decision on § 1101(a)(42)(A), is arguably neither a pure question of fact, nor of statutory interpretation. And the extent to which such mixed questions may be resolved by a Court of Appeals, without first remanding to the agency for its consideration, has not been clearly settled by the Supreme Court. *Compare Thomas*, 126 S.Ct. at 1615 ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."(quoting *Ventura*, 537 U.S. at 16, 123 S.Ct. 353) (internal quotation marks omitted)) *with id.* (requiring remand, and observing that "[t]he matter requires determining the facts and deciding whether the facts as found fall within a statutory term"); *Hussain v. Gonzales*, 477 F.3d 153, 157-58 (4th Cir. 2007) (distinguishing between factual issues not considered by the BIA, and statutory issues, and reasoning that *Ventura* and *Thomas* were directed only toward *factual* issues); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132-35 (9th Cir. 2006) (considering a variety of factors-including the fact that the issue being decided would, following

matter of wise *discretion*. *Cf. Jian Hui Shao v. Bd. of Immigration Appeals*, 465 F.3d 497, 501, 503 (2d Cir. 2006) (concluding that "the BIA is better situated than we are to decide the *statutory interpretation* question in the first instance," and noting that "[o]ur decision to remand this *question of law* to the BIA for resolution in the first instance is supported by recent decisions of the Supreme Court of the United States and our Court" (emphases added)); *Yuanliang Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 116 (2d Cir. 2006) ("Because we conclude, as a matter of *discretion*, that it is prudent and useful for us to remand the issue of frivolousness, we need not address the more complicated question of when remands to the BIA are *required* by elementary principles of administrative law.").

I believe that the majority's haste in narrowly construing § 1101(a)(42)(A)-and, therefore, in cabining the BIA's discretion-is particularly troubling given the circumstances of this case. At stake is a rule of the BIA that has been in place, and relied upon, for over ten years. *See S-L-L-*, 24 I. & N. Dec. at 14 (Board Member Pauley, concurring) ("[N]otwithstanding my belief that *Matter of C-Y-Z-* ... was wrongly decided, I would not overrule it now, nearly a decade later and in the aftermath of

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(continued...)

a remand to the BIA, have been reviewed by the court *de novo* anyway-in concluding that the *Thomas-Ventura* remand rule did not apply to the particular issue in question); *Ucelo-Gomez*, 464 F.3d at 170 ("[I]f a reviewing court can state with assured confidence (absent agency guidance as to its protectability under the INA) that a group would or would not under any reasonable scenario qualify as a 'particular social group,' it need not remand, and may rule on the issue in the first instance.").

thousands of decisions applying it to grant asylum on a derivative basis."). In addition, the invalidation of *C-Y-Z-'s* rule will have sweeping ramifications for this court's immigration law docket; by one estimate, "70-80 percent of the [petitioners in our court] are Chinese seeking asylum to escape their homeland's family planning policies." *BIA Appeals Remain High in 2nd and 9th Circuits*, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C.), Feb. 2005, *available at* http:// www. uscourts. gov/ ttb/ feb 05 ttb/ bia/ index. html (citing statement of Elizabeth Cronin). Given all this, our court should have approached the question of *C-Y-Z-'s* permissibility-either as it was or with nuanced modifications-not with haste, but with trepidation. For the truth is that we cannot foretell how the BIA would have interpreted the general definition of § 1101(a)(42)(A), had it been asked to focus on that language.

By trying to decide something that is not yet before us, the majority bars the BIA from bringing its expertise to bear on this sensitive issue. In the process, the majority does not only preclude the BIA from reenacting the *per se* rule of *C-Y-Z*--a rule which, at the proper time, I might well have concluded was "unreasonable" at *Chevron* Step Two, for all of the reasons the majority recites. The majority also prevents the agency from interpreting the general language of § 1101(a)(42)(A) in ways which might have suffered from none of the problems the majority properly associates with the current *per se* rule-ways, incidentally, which might truly have promoted congressional policy goals.[44] In

[44] To cite just one of the many possibilities which the majority prematurely forecloses: had the BIA not relied on § 601(a)'s automatic persecution rule, but instead focused on the general

this respect, the majority opinion keeps the agency from doing what administrative agencies do best, namely, using their expertise to convert general statutes into specific rules that best reflect an underlying legislative intent.[45]

(continued...)

notion of "persecution," the agency might have interpreted § 1101(a)(42)(A) as providing (1) that partners who had tried to marry, and were prevented from doing so, but who stayed together, are jointly eligible for asylum (which conclusion would both (a) promote the congressional policy of keeping families together, and (b) extend asylum eligibility to individuals not already covered by § 601(a)); but (2) that husbands who are legally married at the time of a wife's forced abortion, but who choose to leave their wives behind for good, are not.

[45] I am mindful that the Supreme Court has cautioned that respect for the role and expertise of agencies does not "require that we convert judicial review of agency action into a ping-pong game," and that, therefore, remand is not required when it "would be an idle and useless formality." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969); *see also Li Zu Guan v. INS*, 453 F.3d 129, 135-38 (2d Cir. 2006) (discussing futility standards); *Alam v. Gonzales*, 438 F.3d 184, 187-88 (2d Cir. 2006) (*per curiam*) (same). Moreover, and relatedly, the Supreme Court has clarified that a reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (same).

But, regardless of whether these cases, which limit the necessity to remand, are understood to be "exceptions" to the Chenery and Ventura-Thomas requirements, or merely a reflection of the deeper truth that formulaic statements cannot substitute for sound judgment in particular cases, *see Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 112 (2d Cir. 2006), it remains clear on which side of the line the case before us falls. We simply do not know-and, because the majority and concurring opinions make it almost impossible for the BIA to

Ironically, it was precisely because of the above reasons that the panel in *Shi Liang Lin*-comprised, as I mentioned earlier, of the author of the majority opinion, the principal concurrence, and me-sent it back originally. Yet if the majority's reasoning were valid, then there would have been no reason for the panel to do so. Nonetheless, we sent it back then, and the BIA ruled only as to whether per se refugee status could be granted directly under § 601. *See infra* Part II.B. If the case were sent back again, to allow the agency to consider whether to extend per se protection under § 1101(a)(42)(A), it is possible that the BIA would have agreed with the majority that no such protection should be adopted. Or the BIA might have adopted a more sensible rule. Under the majority's approach, we will never know.

Accordingly, I respectfully, partially, dissent from the majority opinion.

II

But I cannot join the concurrences either. They act as if the BIA, because it mentioned "nexus" in passing, *made a ruling* under § 1101(a)(42)(A). It didn't. Since the agency has yet to interpret the

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(continued...)

consider the general language of § 1101(a)(42)(A) in the first instance, in relation to spouses and partners of directly victimized persons, we are not likely to learn-how the BIA would have interpreted § 1101(a)(42)(A) had it been asked to do so. This is not a case in which the agency's path, while not perfectly clear, can "reasonably be discerned"; nor is it a case in which the agency's likely response to a remand can be predicted with confidence. Rather, it is a case in which (1) the BIA has not yet spoken-at all, and certainly not clearly-on § 1101(a)(42)(A)'s breadth in this area, and (2) our court has, unfortunately, chosen to make further inquiry impossible.

broad language of that section, it is wrong for us to say-as the concurrers do-that the agency expressed views to which we owe deference. And this is so, regardless of whether such a ruling, had it been made, would have passed the requirements of *Chevron* Step Two.

A

In *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), and *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947), the Supreme Court articulated, and then reaffirmed, "a simple but fundamental rule of administrative law": "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Chenery II*, 332 U.S. at 196, 67 S.Ct. 1760. And "[i]f those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* The reason for this rule is obvious: "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment," because "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery I*, 318 U.S. at 88, 63 S.Ct. 454.

The *Chenery* decisions also recognized "an important corollary of the foregoing rule": "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable."

Chenery II, 332 U.S. at 196, 67 S.Ct. 1760. As the Court explained, "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 196-97, 67 S.Ct. 1760. If it were otherwise, an appellate court could impose its own policy judgments under the guise of "review."

Our court has repeatedly recognized and applied these fundamental rules of administrative law: (1) we may only review that which an agency itself has stated; and (2) the agency must make those statements in clear terms. *See, e.g., Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 105 (2d Cir. 2007) ("We cannot opine on this subject, because we must consider only those justifications that the [agency] offered at the time of the rulemaking."); *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 294 n. 3 (2d Cir. 2006) ("[W]e cannot, on appeal, substitute an argument-even one the BIA made in another context-for those that the BIA actually gave to support the conclusion ... dispute[d] on appeal."); *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 400 (2d Cir. 2005) ("[W]e will limit our review of the [agency's] decision to the reasons [it] actually articulates.... To assume a hypothetical basis for the [agency's] determination, even one based in the record, would usurp [the agency's] role."); *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 192 (2d Cir. 2005) ("The government suggests that we may simply supply our own rationale for the BIA's decision in *C-Y-Z-* and then act accordingly. But the Supreme Court has made clear that '[i]t will not do for a court to be compelled to guess at the theory underlying [a particular] agency's action; nor can a

court be expected to chisel that which must be precise from what the agency has left vague and indecisive.' It is not difficult to understand why. Were courts obliged to create and assess ex-post justifications for inadequately reasoned agency decisions, courts would, in effect, be conscripted into making policy."(quoting *Chenery II*, 332 U.S. at 196-97, 67 S.Ct. 1575)).

B

I recite these well-known tenets of administrative law because I believe that they preclude us from taking the route advocated by the concurring opinions. Because the BIA's opinion in *S-L-L-* is lacking in clarity, it is certainly *possible*, with some creativity, to construe the decision as having been based on rationales which the BIA itself did not invoke. But we are not empowered to invoke those reasons. The BIA is required to speak for itself.

1

The precise basis of the BIA's decision in *C-Y-Z-* was anything but clear. But the BIA and this court have in the past stated that it was based on a construction of § 601(a). *See Shi Liang Lin*, 416 F.3d at 188 (noting that, in *C-Y-Z-*, "the BIA held that, *under IIRIRA § 601(a)*, the forced sterilization or abortion of one spouse is an act of persecution against the other spouse ...." (emphasis added)); *see also id.* at 191 ("[A] fresh look at *C-Y-Z-* reveals that the BIA never adequately explained how or why, in the first instance, *it construed IIRIRA § 601(a)* to permit spouses of those directly victimized by coercive family planning policies to become eligible for asylum themselves."(emphasis added)); *see S-L-L-*, 24 I. & N. Dec. at 3 ("In *Matter of C-Y-Z-*, *supra*, we held that a husband whose wife was forcibly

sterilized could establish past persecution *under this amendment* [i.e., IIRIRA § 601(a)]" (emphasis added)).

In *Shi Liang Lin*, the panel

> remand[ed] the instant petitions to the BIA so that the BIA [could]: (a) more precisely explain its rationale for *construing IIRIRA § 601(a)* to provide that the 'forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse' and that, as a result, the spouses of those directly victimized by coercive family planning policies are *per se* as eligible for asylum as those directly victimized themselves; and (b) clarify whether, when, and why boyfriends and fiancés may or may not similarly qualify as refugees *pursuant to IIRIRA § 601(a).*

Shi Liang Lin, 416 F.3d at 192 (emphases added).

Thus, in remanding, the *Shi Liang Lin* panel plainly assumed that the BIA's ruling in *C-Y-Z-* was based on a construction of § 601(a), and accordingly, requested that the BIA explain how § 601(a) might plausibly be read in such a manner. Consistent with these instructions, the BIA's response in *S-L-L-* focused on the scope of § 601(a). *See S-L-L-*, 24 I. & N. Dec. at 1 ("The United States Court of Appeals for the Second Circuit has remanded this case with a request that we further explain our rationale in *Matter of C-Y-Z-*, 'for construing IIRIRA § 601(a) to provide that the "forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse"....' "(internal

citation omitted)); *id.* at 4 ("[W]e reaffirm our holding in *Matter of C-Y-Z-....*").

Perhaps sensing that § 601(a)'s text had little to offer, however, the BIA's decision in *S-L-L-* provided little analysis of that text. Instead, the BIA asserted, conclusorily, that its decision in *C-Y-Z-* "reflects the significant tensions inherent in the IIRIRA amendment"[46] and that "[t]here is no clear or obvious answer to the scope of the protections afforded by the amendment to partners of persons forced to submit to an abortion or sterilization." *S-L-L-*, 24 I. & N. Dec. at 4. The BIA did not hint at what these "tensions" might plausibly be, or why the plain language of § 601(a) should not be taken as establishing the proper scope of "the IIRIRA amendment." Instead, the BIA "reaffirm[ed][its] holding in *Matter of C-Y-Z-*," *id.*, largely on the basis of stare decisis and Congress's supposed acquiescence.

It is the BIA's reticence to engage with § 601(a)'s text-and the resulting ambiguity in the BIA's opinion in *S-L-L-* ---that the concurring opinions now seek to convert into an argument that *S-L-L-* was based, not on § 601(a), but on the general definition of "refugee" found in § 1101(a)(42)(A). It is true that, at one point in *S-L-L-*, the BIA obscurely remarked that "[a]lthough there is no specific reference in the statutory definition of a refugee to a husband's claim based on harm inflicted upon his wife, the general principles regarding nexus and level of harm apply in determining such a claim." *S-L-L-*, 24 I. & N. Dec. at 5.

But this phrase cannot, I believe, establish-as the concurring opinions would have it-that the BIA's

[46] The "IIRIRA amendment" refers, of course, to § 601(a).

decision in *S-L-L-* was based on the general terms "persecution" and "political opinion" found in § 1101(a)(42)(A). And, even if it did, it would not do so clearly (as required by *Chenery II*). Indeed, one can say, as to that: manifestly not.

Notably, in its very next breath, after using the nexus phrase relied on by the concurrers, the BIA in *S-L-L-* stated that it was applying "general principles requiring nexus and level of harm for past persecution in assessing *a claim under the IIRIRA amendment*." *Id.* (emphasis added). It is permissible to read § 601(a) in this way, the BIA argued, because "[a]lthough the wife is obviously the individual subjected to the abortion procedure, Congress was concerned not only with the offensive assault upon the woman, but also with the obtrusive government interference into a married couple's decisions regarding children and family." *Id.* at 6. Therefore, the BIA concludes, "[w]hen the government intervenes in the private affairs of a married couple to force an abortion or sterilization, it persecutes the married couple *as an entity*." *Id.* (emphasis added). It seems to me patent that the BIA reached this conclusion under § 601(a), and not § 1101(a)(42)(A).

2

In my view, then, the BIA's decisions in *C-Y-Z-* and *S-L-L-* were grounded in a (mistaken) belief that, based on an "entity theory" of persecution, spouses of those directly victimized by coercive family planning policies could themselves become directly eligible for asylum under § 601(a). And it is not enough for the concurring opinions to cast doubt on my conclusion; *Chenery II's* "clarity corollary" requires that the agency make clear its decision to rest upon a purported ground. Thus, to restate my

problem with the concurring opinions: They would use the fact that the BIA refused to engage clearly with the text of § 601(a) as a basis for concluding that the BIA was relying on something else. But the incompatibility of this approach with *Chenery II* is apparent.

Moreover, the (at best) ambiguousness of the BIA's decision in *S-L-L-* results in precisely the problems adverted to in Chenery II. For it is far from clear that, had the BIA focused on the general definition of § 1101(a)(42)(A), the agency would have preserved *C-Y-Z-'s* rule in its current form. That is, had the BIA been asked to examine, not § 601(a)'s automatic-eligibility rule, but instead the more general definition of "refugee," it is quite possible that the BIA would have come up with a different *per se* rule, and perhaps even one that would have avoided the many problems inherent in its *C-Y-Z-* approach. See supra at 8-9.

Under the concurring opinions's approach, we are unlikely to know. For, by reading the agency's opinion as deciding that which it did not decide-and certainly did not decide clearly-the concurring opinions, in effect, preclude the agency from thinking deeply and fully about the matter. And that is the very thing which the clarity requirement of *Chenery II* is meant to make the agency do.

III

In the end, as at the beginning, the BIA read us to ask-what we in fact asked: whether *C-Y-Z-'s* rule could be based upon § 601(a)'s text, and if so, what its reasons were. The agency could, under our remand, have turned more broadly to § 1101(a)(42)(A). It didn't, and it certainly didn't do so clearly. Today, we properly reject the BIA's ruling

interpreting the coverage of § 601(a). But in the spirit of *Ventura*, *Thomas*, and our own tradition of sending things back to the BIA for a first reading, we should now ask the BIA something that it has never been asked by any court: *What would you do under § 1101(a)(42)(A), given that § 601(a) does not give you the authority to do what you did in C-Y-Z-* and *S-L-L-?*[47]

We do not know what answer the BIA would give to that question for the simplest of reasons. The agency has never been specifically asked. And we should not, indeed *cannot* properly, assume that what it would say in response-one way or another-*would* be either a reasonable or an unreasonable

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[47] The majority, attempting to answer my opinion, says, at footnote 15, that remanding Zhen Hua Dong's case to the BIA would be engaging in useless "ping pong." With great respect, the majority in that footnote simply repeats its conflation of two quite separate things. It is certainly true that the BIA has had multiple occasions to consider the "spousal" question under § 601(a), and has answered (incorrectly, we all agree) that *per se* persecutee status is available to spouses under that section. But it has never been asked what the status of spouses or of people situated like Zhen Hua Dong would be under the general terms of § 1101(a)(42)(A), if § 601(a) did not cover spouses. And, in view of its consistent-but incorrect, we today hold-rulings that § 601(a) did apply to spouses, the BIA never had any reason to address that question on its own. The concurrers, nevertheless, act as if the BIA had addressed the question and had validly given spouses *per se* persecutee status under § 1101(a)(42)(A). The majority holds that even if the BIA were to consider the question, it could not validly say that spouses et al. were covered *per se*. Both the majority and the concurrers seem to me to overstep, and for precisely the reasons indicated in *Ventura* and *Thomas*. It is not proper for appellate courts to speak for the BIA and to decide the validity of that "speech," before the agency has had a full and focused opportunity to make its position clear. On § 1101(a)(42)(A), the agency has not yet had that opportunity. It is not ping pong when only one player has been invited to the relevant table.

interpretation of the statute. Moreover, since it is possible that such interpretation might have covered Zhen Hua Dong, I cannot concur with the majority and concurrences that his case is now hopeless.

The sad thing is that, in their rush to reach a result in terms of who gets asylum and who does not, both the majority and the concurrers sanction bad law and bad practices with respect to our relationship with the BIA. The reason they do this is certainly understandable. But it is all unnecessary. It's just being in a hurry.

* * * *

For all these reasons, while I concur with the majority opinion insofar as it (1) dismisses the petition of Xian Zou for lack of jurisdiction; (2) denies the petition of Shi Liang Lin as moot; and (3) persuasively interprets 8 U.S.C. § 1158(c)(2)(A) as being limited to a "fundamental change" in *country* conditions, I must respectfully dissent from the premature denial of Zhen Hua Dong's petition.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office of Immigration Review
Falls Church, Virginia 22041
File: A 77 293 661 – New York
Date: November 27, 2006

In re: ZHEN HUA DONG
IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Matthew A Bondy, Esquire

ON BEHALF OF DHS:
William J. Howard
Principal Legal Advisor USICE

This case was consolidated with two other cases and remanded by the United States Court of Appeals for the Second Circuit with a request that we more precisely explain the rational underlying our decision in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), for extending refugee status to an applicant whose spouse was forced to undergo an abortion or sterilization procedure and to clarify if and when boyfriends and fiances may similarly qualify as refugees. *Shi Liang Lin v. United States Dept. of Justice*, 416 F.3d 184, 192 (2d Cir. 2005).

In *Matter of S-L-L-*, 24 I&N Dec. 1 (BLA 2006), we limited our holding in *Matter of C-Y-Z-*, *supra* to applicants who are legally married and declined to

extend our holding to unmarried applicants claiming persecution based on a partner's forced abortion or sterilization. *Matter of C-Y-Z-*, at 4. Rather, an unmarried partner claiming persecution based on a partner's forced abortion or sterilization must demonstrate that he or she qualified as a refugee under the terms of the "other resistance" clause in section 101(a)(42) of the Act. *Id.* as the respondent in this case was not married at the time of either of his partner's abortions, we consider his case under the terms of the clause referring to "other resistance to the coercive family planning program."

I. BACKGROUND AND PRIOR PROCEEDINGS

The respondent, a native and citizen of the People's Republic of China (PRC), seeks asylum, withholding of removal, and protection under the Convention Against Torture (CAT). In his asylum application, he claimed that he was persecuted in China and feared future persecution if returned for having violated that country's family planning laws. His asylum application states that his fiancée was forced to have two abortions and that he fears harassment by family planning officials were he to be returned to China as well as detention and fines for his illegal departure.

At the hearing, in lieu of testimony in support of the asylum claim, the parties stipulated that the respondent's testimony would be consistent with the account of events provided in his asylum application. The respondent's asylum application indicates that he and his fiancée began living together in September 1997. At that time, he was 21 and his fiancée was 20, too young to legally marry. Although they practiced contraception and did not plan on having a child, his fiancée learned that she was pregnant during a routine exam in August 1998.

She was forced to have an abortion on the same day. After this incident, the respondent was warned by family planning officials that he would be "fined and sterilized if it happened again."

The respondent's fiancée became pregnant again in the summer of 1999. In order to avoid another forced abortion, she ran away in July 1999 to a relative's home on the date that she was scheduled for a gynecological exam. Family planning officials then went to the respondent's residence, but he had left before they arrived. The respondent left China for the United States in mid-October 1999.

After the respondent's departure, his fiancée returned home to prepare papers to travel to Taiwan to visit her father. Family planning officials located her and forced her to undergo a second abortion. An affidavit from the respondent's fiancée indicates that the second abortion occurred in November 1999 and that she is now resident in Taiwan.

The Immigration Judge denied the respondent's claims for asylum, withholding of removal, and CAT protection. She held that the respondent could not rely upon *Matter of C-Y-Z-, supra*, to claim past persecution based on his fiancée's forced abortions because the Board has not "further extended the protections [of the coercive population control provisions of the refugee definition] to fiancees or girlfriends or boyfriends of people who have been forced to undergo an involuntary abortion or sterilization." She concluded that "[b]ecause he is not the legal spouse of this woman, he does not qualify for protection." She therefore found the respondent ineligible for asylum based on his fiancée's forced abortions.

The Immigration Judge found that the respondent failed to demonstrate a well-founded fear of future persecution for having illegally departed China or for former violations of the family planning laws. She also concluded that the respondent failed to meet his burden for withholding of removal or CAT protection.

II. ANALYSIS

In order to qualify for asylum based on his fiancée's forced abortions, the respondent must demonstrate that he suffered past persecution based on "other resistance" to the coercive population control policy. As we stated in *Matter of C-Y-Z-, supra*, "in the context of coercive family planning, the term 'resistance' covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirement of the family planning law." *Id.* at 1C. To demonstrate that he was persecuted on the basis of his resistance to either of the forced abortions, the respondent must show that, prior to the abortion, he identified himself or was identified as the putative father and expressed his opposition or resistance to the abortion. Additionally, the respondent must demonstrate that his relationship with his fiancee was sufficiently committed to support a finding that the harm arising from a forced abortion of his child amounted to past persecution.

On the record before us the respondent did not engage in any conduct that would support a finding that he was persecuted on account of his "resistance" to the coercive population control law. In regard to the first abortion, the respondent indicated that attempts at contraception failed, that the pregnancy

was unplanned, and the abortion was performed when the pregnancy was first discovered. As we made clear in *Matter of C-Y-Z-*, "[m]erely impregnating one's girlfriend does not constitute an act of resistance . . ." *Id.* at 11, citing *Zhang v. Ashcroft*, 395 F.3d at 532, 532 (5th Cir. 2004). The respondent did not otherwise express opposition or attempt to prevent the first abortion.

After his fiancée's first pregnancy, family planning officials warned the respondent that he "would be fined and sterilized if it happened again." This warning is relevant to the question whether the respondent currently has a well-founded fear of persecution, but does not indicate that the respondent expressed resistance to the coercive population control program.

Prior to the second abortion, the respondent left China for the United States without expressing opposition or resisting enforcement efforts. Although his mother attempted to negotiate with enforcement officials, her efforts in this regard were not resistance by the respondent.

The respondent did engage in any conduct or activity to express his opposition to the abortions or to intervene to prevent the abortions. Nor has he otherwise demonstrated that he has been persecuted on account of resistance of the PRC Government's family planning policy. We therefore do not reach the question whether the respondent's relationship with his fiancee was sufficiently committed to support a finding that the harm arising from a forced abortion amounted to past persecution.

We now turn to the question whether the respondent has a well-founded fear of persecution based on the threats of sterilization made after his

fiancée's first pregnancy or his illegal departure from China. The threat of sterilization in the event of a second unauthorized pregnancy occurred several years ago when both the respondent and his fiancee were living together in China. At the hearing below, the respondent submitted an affidavit from his fiancee, stating that she had left China to go to Taiwan to be reunited with her father. Under these circumstances, as the Immigration Judge found, the risk of sterilization upon return is entirely speculative. Moreover, were the respondent's fiancee to return to China, she and the respondent now meet the minimum age requirements for marriage. Under these circumstances, the respondent has not demonstrated a well-founded fear of persecution based on applicant of the coercive family planning law.

We also agree with the Immigration Judge that the respondent has not demonstrated a well-founded fear of persecution on account of his departure from China without permission. The fact that a country may punish a citizen for an illegal departure does not generally qualify an alien for refugee protection. *See Li v. INS*, 92 F.3d 985, 988 (9th Cir. 1996); *Matter of Sibrun*, 18 I&N Dec. 354, 359 (BLA 1983). The respondent has not shown that the punishment he may face for illegal departure will be of sufficient severity to amount to persecution or that such punishment would be on account of a protected ground under the "refugee" definition in section 101(a)(42) of the Act.

As the respondent has not demonstrated a well-founded fear of persecution, he also fails to show that he would "more likely than not" be persecuted on account of a protected ground for purposes of

withholding of removal. 8 C.F.R. § 1208.16(b)(2)(2006).

Finally, the Immigration Judge correctly determined that the respondent failed to demonstrate that he would be subjected to torture within the meaning of the Convention Against Torture were he to be returned to China. We will therefore dismiss the respondent's appeal from the Immigration Judge's decision.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

United States Court of Appeals, Second Circuit.

Shi Liang LIN, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and Attorney General Gonzales,* Respondents.

Zhen Hua Dong, Petitioner,

v.

United States Department of Justice and Attorney General Gonzales, Respondents.

Xian Zou, Petitioner,

v.

Alberto R. Gonzales, Attorney General, Respondent.

Docket Nos. 02-4611, 02-4629, 03-40837.

Argued: May 27, 2005.

Decided: July 29, 2005.

Before: CALABRESI, KATZMANN, B.D. PARKER, Circuit Judges.

KATZMANN, Circuit Judge.

In 1997, the Board of Immigration Appeals construed § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") to provide that the forced sterilization or abortion of one spouse is an act of persecution against the other spouse and that, as a result, the spouses of those directly victimized by coercive

* In each of the three petitions we here consider, Attorney General Alberto R. Gonzales is, pursuant to Federal Rule of Appellate Procedure 43(c)(2), automatically substituted for former Attorney General John Ashcroft as Respondent.

family planning policies are *per se* as eligible for asylum as those directly victimized themselves. *See In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (en banc). The BIA did not, however, identify the specific statutory language pursuant to which it deemed spouses eligible for asylum under IIRIRA § 601(a), nor did the BIA endeavor to explain the reasoning motivating its chosen construction. Yet it was at least partially on the basis of the BIA's decision in *C-Y-Z-* that immigration judges ("IJs")-in decisions summarily affirmed by the BIA-denied the asylum applications of the petitioners whose claims we consider here, two of whom (Lin and Zou) are boyfriends of those directly victimized by China's coercive family planning policies, the other of whom (Dong) is the fiancé of a woman directly victimized by such policies.

Because we hold that an immigration judge's construction of the Immigration and Nationality Act is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and because the BIA failed, in *C-Y-Z-*, to articulate a reasoned basis for making spouses eligible for asylum under IIRIRA § 601(a) in the first place, we **REMAND** the instant petitions to the BIA so that the BIA can: (a) more precisely explain its rationale for construing IIRIRA § 601(a) to provide that the "forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse" and that, as a result, the spouses of those directly victimized by coercive family planning policies are *per se* as eligible for asylum as those directly victimized themselves, *C-Y-Z-*, 21 I. & N. Dec. at 919; and (b) clarify whether, when, and why boyfriends and

fiancés may or may not similarly qualify as refugees under IIRIRA § 601(a). We retain jurisdiction to rule on the instant petitions after disposition of the remand.

I. BACKGROUND

The Immigration and Nationality Act ("INA" or "Act") vests the Attorney General with the discretionary authority to grant asylum to any alien who is a "refugee," that is, a person unable or unwilling to return to his or her native country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42).

Prior to 1996, the BIA construed the Act to permit victims of China's coercive family-planning policy to claim "refugee" status only if the victims demonstrated that China's family-planning policy had been or would be "selectively applied" to them on the basis of a protected ground. *See In re Chang,* 20 I. & N. Dec. 38, 44 (BIA 1989). But in 1996, Congress amended the statutory definition of "refugee" to broaden the number of individuals eligible for asylum in connection with coercive family-planning policies such as China's. To wit, Congress provided, in § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), that:

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to

> have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

See Pub.L. No. 104-208, § 601(a), Title VI-A, 110 Stat. 3009-546, 3009-689 codified at 8 U.S.C. § 1101(a)(42).

Not long thereafter, the BIA held that, under IIRIRA § 601(a), the forced sterilization or abortion of one spouse is an act of persecution against the other spouse and that, as a result, the spouses of those directly victimized by coercive family planning policies are *per se* as eligible for asylum as those directly victimized themselves. *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (en banc). Unfortunately, as the Third Circuit has noted and as we will discuss in greater detail below, the BIA "did not explain the basis for this conclusion," *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 225 (3d Cir.2004), nor did the BIA clarify or supplement its analysis in any subsequent opinion.

Yet it was at least partially on the basis of the BIA's decision in *C-Y-Z*-that IJs denied the asylum applications of the petitioners whose claims we consider here:

Shi Liang Lin claims that he suffered persecution in China when his girlfriend-whom he could not then legally marry because of her young age-was forced to have an abortion. However, the IJ denied Lin's application on the ground that it would not be

"appropriate to expand ...*Matter of C-Y-Z-* to include unmarried couples." The IJ reasoned that such an expansion would be inappropriate because, *inter alia,* Congress had imposed a 1,000 person-per-year cap on the number of persons eligible for asylum under IIRIRA § 601(A) and, given this cap, opening the immigration floodgates to non-spouses could jeopardize the ability of those individuals more directly harmed by coercive family-planning policies to secure immigration relief.[48]

Another IJ similarly rejected petitioner Xian Zou's claim that he suffered past persecution when his girlfriend was forced to have an abortion.[49] In Zou's case, the IJ cited *C-Y-Z-*, but argued-without providing any meaningful analysis-that there was "absolutely no way that Section 101(a)(42) of the Immigration and Nationality Act and supporting case law apply [to Zou]" because Zou had not married his girlfriend in either a traditional or legal ceremony.

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[48] We note that the 1,000 person-per-year cap has been lifted by § 101(g) of the recently enacted REAL ID Act. *See* REAL ID Act of 2005, Pub.L. No. 109-13, § 101(g), 119 Stat. 231 (May 11, 2005) (repealing the IIRIRA provision that initially imposed the cap). Accordingly, a construction of IIRIRA § 601(a) can no longer rely-in whole or in part-on the existence of an annual cap, as did the IJ's construction of § 601(a) in *Lin.*

[49] Zou also claims to have vocally protested the decision to subject his girlfriend to a forced abortion and that, in the wake of this protest, family planning officials pushed him and threatened him. The IJ deemed this aspect of Zou's claims not credible. Given that we are otherwise remanding Zou's case, we need not and do not assess the probity of this particular credibility determination. We also note that the IJ in Zou's case expressly stated that "[w]ith respect to the issue of the respondent's girlfriend's abortion" he would "make neither a negative or positive credibility finding."

Finally, an IJ denied the application of petitioner Zhen Hua Dong, who sought asylum in connection with the persecution of his *fiancée,* unlike petitioners Lin and Zou who sought asylum in connection with the persecution of their respective *girlfriends.* Dong claims that his fiancée discovered that she was pregnant during a routine exam in August 1998 and was forced to have an abortion that same day. Dong further claimed that he, himself, was warned by family planning officials that he would be fined and sterilized if his fiancée became pregnant again. Finally, Dong claimed that his fiancée became pregnant for a second time in the summer of 1999 and that although he was able to flee, she ultimately was subjected to a second forced abortion in November 1999. Although all of Dong's allegations were deemed credible (pursuant to a stipulation of the parties), the IJ held that Dong failed to establish eligibility for asylum. The IJ argued that although the BIA held, in *C-Y-Z-*, that "the spouse of a person who was forced to undergo an abortion or sterilization pursuant to a coercive population control program is ... a refugee under [IIRIRA § 601(a)]," the BIA has not "further extended the protections of this amended definition of refugee to fiancées or girlfriends or boyfriends of people who have been forced to undergo an involuntary abortion or sterilization." Accordingly, the IJ held that Dong could not establish eligibility for asylum in connection with his fiancée's forced abortions.

The BIA summarily affirmed the IJ's decision in each of these three cases pursuant to the BIA's streamlining regulations-that is to say, in each of these three cases, a single Board member affirmed, without opinion, the *results* of the IJ's decision below. *See* 8 C.F.R. § 1003.1(e)(4).

II. DISCUSSION

It is well-settled that when the BIA summarily affirms an IJ's decision, we review the decision of the IJ directly. *Secaida-Rosales v. INS,* 331 F.3d 297, 305 (2d Cir.2003). Yet we have never before discussed whether an IJ's construction of the INA is entitled to review under the deferential standards set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), where, as here, an IJ has engaged in statutory construction and the BIA has summarily affirmed. Accordingly, we address this question at the threshold.

This Circuit has previously recognized that "[a]n agency interpretation qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Coke v. Long Island Care at Home, Ltd.,* 376 F.3d 118, 130 (2d Cir.2004) (quoting *United States v. Mead Corp.,* 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)). Here, it is beyond cavil that Congress has, as a general matter, delegated the authority to make immigration rules carrying the force of law; the INA, after all, unambiguously vests such power in the Attorney General, among others. *See, e.g.,* 8 U.S.C. § 1103(a)(1) (providing that the Attorney General's determinations and rulings on questions of immigration law are controlling); 8 U.S.C. § 1158(d)(5)(B) (providing that the Attorney General "may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this [Act]"); *see also INS v. Aguirre-Aguirre,* 526 U.S. 415, 424, 119

S.Ct. 1439, 143 L.Ed.2d 590 (1999) (holding that principles of *Chevron* deference are applicable to the Attorney General's constructions of the INA, generally, and to the BIA, specifically, precisely because Congress has delegated rule-making power to the Attorney General and the Attorney General has, in turn, further delegated rule-making power to the BIA).

The operative question is whether an IJ's summarily affirmed construction of the INA is "promulgated in the exercise of" the Attorney General's authority. We hold that it is not for two principal reasons. First, although the Attorney General has expressly delegated rule-making authority to the *BIA, see, e.g.,* 8 C.F.R. § 1003.1(g),[50] the government does not point to any rule or regulation indicating that the Attorney General ever intended to-let alone did in fact-delegate similar

[50] 8 C.F.R. § 1003.1(g) provides:

> Decisions as precedents. Except as Board [i.e. BIA] decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

rule-making authority to the IJs, themselves. Indeed, agency practice strongly suggests that the more than 200 IJs employed by the Executive Office for Immigration Review at 53 immigration courts around the country[51] lack the juridical power to issue decisions that are in any way binding on future parties, on one another, or on the BIA. *Cf. Mead Corp.,* 533 U.S. at 233, 121 S.Ct. 2164 (noting, in declining to afford *Chevron* deference to the agency construction there at issue, that the agency itself treated the classifications it had made as binding only in limited circumstances and that, furthermore, "[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting"). Absent the power to issue binding decisions, IJs cannot, themselves, be said to possess the requisite ability to issue, on behalf of the Attorney General, a "rule" carrying the force of law-because one of the hallmarks of a legal "rule" is that it will, in fact, apply equally in all cases of a similar kind. *See Black's Law Dictionary* 1357 (8th ed.2004) (defining "rule" to mean "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation"). Indeed, were we to accord *Chevron* deference to non-binding IJ statutory interpretations, we could find ourselves in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction we had affirmed as reasonable the Monday before. Such a scenario cannot be countenanced in a system of law.

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[51] *See* U.S. Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, http:// www.usdoj.gov/eoir/ocijinfo.htm.

Second and similarly, we believe that a summarily affirmed IJ decision also cannot be construed as a "rule" promulgated by the *BIA* on behalf of the Attorney General. The government stressed at oral argument that a summarily affirmed IJ decision is deserving of deference because the BIA-in summarily affirming-deems the IJ's decision to be a "final agency determination" pursuant to 8 C.F.R. § 1003.1(e)(4). However, the fact that the BIA deems an IJ's decision to be a "final agency determination" does not transform the IJ's legal construction into a BIA rule carrying the force of law. For one thing, the BIA's streamlining regulations expressly provide that when the BIA summarily affirms an IJ's decision, the BIA approves only "the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision." *See id.* Thus, when a court of appeals is faced with a BIA's summary affirmance, the court has no way of knowing that the BIA has, in fact, adopted the IJ's particular construction of a statute when the court is asked to assess its reasonableness. And in addition, as already discussed above, agency practice suggests that neither the BIA, nor the IJs, treat summary affirmances as binding in any event.

There is, in sum, no reason to believe that an IJ's summarily affirmed decision contains the sort of authoritative and considered statutory construction that *Chevron* deference was designed to honor. As a result, we decline to extend *Chevron* deference to any statutory construction of the INA set forth in a summarily affirmed IJ opinion.

Of course, individual IJ decisions may be entitled to the lesser form of deference established under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), to the extent that such decisions

possess "those factors which give [the agency's interpretation] power to persuade, if lacking power to control." *Id.* at 140, 65 S.Ct. 161; *see also Mead Corp.,* 533 U.S. at 235-36, 121 S.Ct. 2164. We need not consider this issue here, however, because even assuming *arguendo* that IJ decisions are generally entitled to *Skidmore* deference, the IJ decisions before us do not possess any persuasive power. The reason is simple: because the BIA failed, in *C-Y-Z-*, to articulate a reasoned basis for making spouses eligible for asylum under IIRIRA § 601(a), IJs cannot possibly advance principled-let alone persuasive-reasons to distinguish between, on the one hand, the BIA's decision to create spousal eligibility under IIRIRA § 601(a), and, on the other hand, the eligibility of boyfriends and fiancés under that same statutory provision.

For much the same reason, it is impossible for us to properly determine, upon a *de novo* review of IIRIRA § 601(a), whether to affirm or reverse the results reached in the instant petitions. Although admittedly this Court has previously deferred to the result of the BIA's decision in *C-Y-Z-, see, e.g., Zhou Yun Zhang v. INS,* 386 F.3d 66, 73 (2d Cir.2004), a fresh look at *C-Y-Z-* reveals that the BIA never adequately explained how or why, in the first instance, it construed IIRIRA § 601(a) to permit spouses of those directly victimized by coercive family planning policies to become eligible for asylum themselves. To be clear, we do not suggest that there can be no such basis-on that we take no stand whatsoever-only that the BIA failed to supply it. The BIA never, for example, identified the specific statutory language pursuant to which it deemed spouses eligible for asylum under IIRIRA § 601(a), nor did the BIA endeavor to explain the

reasoning motivating its desired construction. Frankly, it appears to us that the BIA's analysis in *C-Y-Z-*rested largely on the Immigration and Naturalization Service's concession in that case. *See, e.g., In re C-Y-Z-*, 21 I. & N. Dec. at 918 (stating that "[t]he Service also conceded ... that the husband of a sterilized wife can essentially stand in her shoes"); *id.*(noting that "[w]e find that the applicant in this case has established eligibility for asylum by virtue of his wife's forced sterilization. This position is not in dispute, for the Service conceded in its appeal brief that the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution"); *id.* at 919 (holding that "[i]n view of the enactment of section 601(a) of the IIRIRA and the agreement of the parties that forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse, the applicant has established past persecution").

Thus, because the BIA has never adequately explained its rationale for establishing *spousal* eligibility under IIRIRA § 601(a), we cannot reasonably determine the status of boyfriend and fiancé eligibility under IIRIRA § 601(a). Of course, it may be the case that permissible distinctions can be drawn between spousal eligibility, on the one hand, and boyfriend and fiancé eligibility, on the other. It may also be the case, however, that the rationale for spousal eligibility applies with equal logic and force to the eligibility of boyfriends and fiancés. Until the BIA has clarified why it established spousal eligibility in the first instance, we cannot know.[52]

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[52] We note that our Court has recently held that a parent or parent-in-law of a person persecuted under a coercive family planning policy is not *per se* as entitled to asylum under

The government suggests that we may simply supply our own rationale for the BIA's decision in *C-Y-Z-* and then act accordingly. But the Supreme Court has made clear that "[i]t will not do for a court to be compelled to guess at the theory underlying [a particular] agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.,* 332 U.S. 194, 196-97, 67 S.Ct. 1575 (1947). It is not difficult to understand why. Were courts obliged to create and assess ex-post justifications for inadequately reasoned agency decisions, courts would, in effect, be conscripted into making policy. Such an activity is, for myriad and obvious reasons, more properly the province of other bodies, particularly where, as here, the other body is an agency that can bring to bear particular subject matter expertise. Accordingly, we must reject the government's entreaty to adjudicate by ex-post hypothesis.

For all the reasons stated above, we remand the instant petitions to the BIA so that the BIA can: (a) more precisely explain its rationale for construing IIRIRA § 601(a) to provide that the "forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse" and that, as a result, the spouses of those directly victimized by coercive family planning policies are per se as eligible for

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(continued...)

IIRIRA § 601(a) as those directly victimized themselves. *See Ai Feng Yuan v. U.S. Dep't of Justice,* Nos. 02-4632-ag, 02-4635-ag, 2005 WL 1745200, 416 F.3d 192 (2d Cir. Jul. 26, 2005). We believe, however, that the Court's decision in *Yuan* does not compel a specific outcome in the cases before us.

asylum as those directly victimized themselves; and (b) clarify whether, when, and why boyfriends and fiancés may or may not similarly qualify as refugees pursuant to IIRIRA § 601(a). This panel retains jurisdiction to rule upon the instant petitions and decide the issues on appeal after the disposition of the remand.

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A77-293-661- New York

Date: September 25, 2002

In re: DONG, ZHEN HUA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bondy, Matthew, Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
New York, New York

File No.: A 77 293 661
October 12, 2000

In the Matter of)
ZHEN HUA DONG
IN REMOVAL PROCEEDINGS
Respondent

CHARGE: Section 212(a)(7)(A)(i)(I) of the immigration and Nationality Act - present in the United States without valid entry documents.

APPLICATIONS: Section 208 of the Immigration and Nationality Act - asylum;

Section 241(b)(3) of the Immigration and Nationality Act - withholding of removal;

Article 3 of the Convention Against Torture.

ON BEHALF OF RESPONDENT:
Matthew Bonde
Tsoi and Associates
277 Broadway, Suite
New York, NY 10007

ON BEHALF OF SERVICE:

Richard Davey

Assistant District Counsel

1401 New York District

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 24-year-old single male who is a native and citizen of the People's Republic of China. He entered the United States near Los Angeles, California on or about October 22, 1999 without valid entry documents. He has, through his attorney, conceded the truthfulness of the factual allegations contained in the Notice to Appear and has conceded he is removable as charged. Based upon his admissions, removability has been established by the appropriate burden of proof under 8 C.F.R. Section 240.8.

As relief from removal, the respondent has submitted an application for asylum, and that application has been marked into evidence as Exhibit 3. That application is also considered 1x be a request for withholding of removal' under Section 241b) (3) of the Act and under Article 3 of the Convention Against Torture. Pursuant to applicable regulations, the respondent's application for asylum was forwarded to the Department of State for their advisory opinion. The State Department response has been marked into evidence as Exhibit 6. There is additional background evidence that has been provided by the respondent, and that has been marked into evidence as Group Exhibit 7. The Court has reconsidered all of the background materials.

The alien bears the evidentiary burdens of proof and persuasion in his applications for withholding of

removal and asylum. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). An alien seeking a discretionary grant of asylum must demonstrate status as a refugee as that term has been defined by the Act. That definition has been amended to include a person who has been forced to undergo an abortion or sterilization pursuant to a coercive population control program. Such a person is deemed to have suffered past persecution on account of a political opinion and is deemed to have a well-founded fear of future persecution on account of a political opinion. The Board of Immigration Appeals has extended the scope of the definition of refugee to include the spouse of a person who was forced to undergo an abortion or sterilization procedure pursuant to a coercive population control program. *See Matter of C-Y-Z-*, Int. Dec. 3319 (BIA 1997).

With regard to a claim for withholding of removal, the respondent has a higher burden of proof. That burden is to show by a clear probability that the respondent would face persecution on account of one of the five enumerated grounds. With regard to withholding of removal under Article 3 of the Convention Against Torture, the same clear probability standard applies. For a claim under the Torture Convention, the respondent must show that it is more likely than not that he would be subject to torture by agents of the government of the People's Republic of China upon his return. He need not show that the torture be connected to any of the five protected grounds.

In lieu of the respondent's testimony, a stipulation was entered into by the parties. The stipulation entered into by the parties is that if the respondent had testified regarding the substance of his claim, his testimony would have been consistent with his

asylum application. Moreover, the stipulation concedes that the respondent's testimony in court would have been credible.

The substance of the respondent's asylum application, as reflected in Exhibit 3, is that he began living with his fiancée in September of 1997 and that she became pregnant in August of 1998 by accident. The application indicates that she was forced to have an abortion by the family planning authorities when she went in for a routine gynecological checkup. The application goes on to note that his fiancée became pregnant again in the summer of 1999, and that she ran away to avoid another forcible abortion. The application indicates that the fiancée returned home at some unspecified date 1999 and was apprehended by family planning officials and forced to undergo a second involuntary abortion. Exhibit 5 is an affidavit from the respondent's fiancée or girlfriend who is now residing in Taiwan. That affidavit indicates that she underwent a second coercive abortion in November of 1999.

As noted previously, this application for asylum, as well as the affidavit submitted by the fiancée, are given full weight in terms of consistency and credibility.

With regard to a claim under the Torture Convention, the respondent did briefly testify. It is his testimony that if he was returned to China, he would be jailed, fined, tortured, and beaten because he left the country without permission. He also testified that he worries that birth control officials might arrest him.

Based upon the stipulation between the parties with regard to the respondent's claim for political

asylum and his claim for withholding of removal under Section 241(b)(3) of the Act, the Court finds, in accordance with the stipulation, that the respondent's application is credible in all respects. However credible that application may be, it does not state a claim under the asylum laws of this country. It does not state a claim even under the expanded definition of refugee which encompasses people, or the spouses of people, who have been forced to undergo an involuntary abortion or sterilization pursuant to a coercive population control program.

The revised definition of refugee has been recited; and subsequent to that revision in the definition of refugee, the Board issued their precedent decision in *Matter of C-Y-Z-, supra.* In that Board decision, it was held that the spouse of a person who was forced to undergo an abortion or sterilization pursuant to a coercive population control program is deemed to stand in the same shoes as the person who underwent that procedure and is, therefore, a refugee under the amended definition in INA Section 101 (a) (42) (B). However, the Board has not further extended the protections of this amended definition of refugee to fiancées or girlfriends or boyfriends of people who have been forced to undergo an involuntary abortion or sterilization. Simply put, the law has not been stretched to the extent that the respondent is asking the law to be stretched so that he would be covered. The respondent was not married and is not the legal spouse of the woman whom he claims was forced to undergo two abortions pursuant to the family planning laws of the People's Republic of China. Because he is not the legal spouse of this woman, he does not qualify for protection either under the asylum laws of this

country or for withholding of removal under Section 241(b) (3) of the Act.

With regard to his claim that he has a well-founded fear of future persecution, I would only note that that claim, at this point in time, is entirely hypothetical. The respondent is still single, he is not married, and he has no legal spouse on which premise such a claim. With regard to his girlfriend or fiancée, it appears that she is currently living in Taiwan and, therefore, in the future would not be subject to the family planning laws of the People's Republic of China. Any claim under the family planning laws with regard to a fear of future persecution, at this point in time, is entirely speculative.

Finally, with regard to the respondent's claim for withholding of removal under the Convention Against Torture, I believe that he has failed to meet his burden to establish that it is more likely than not that he would be subject to torture upon his return to China either because he left that country without exit permission or under the family planning laws. The only background material that the Court has with regard to people returning to China after having left without permission is contained in Exhibit 6 on Page 41. The State Department response does indicate that people who are returned to China after having left without permission are subject to administrative detention and fines. There is nothing in the background materials that indicates that it is more likely than not that a person who left without permission would be tortured upon their return to the People's Republic of China. It appears from the background materials that the respondent would be fined and that he would be subject to administrative detention "until that fine

was paid. Since the respondent has certainly not been identified as an organizer or enforcer of illegal trafficking in human beings, it does not appear that he would be subject to any more severe sanctions than administrative detention and fine. In any event, the respondent has certainly utterly failed to establish that there is a clear probability that he would be tortured upon his return because of his illegal exit.

The respondent also indicated that he worries that he might be arrested by family planning officials if he returned to the People's Republic of China. This statement certainly does not establish that it is more likely than not that he would be tortured upon his return under the family planning laws. As stated previously, the respondent is a single young man, his girlfriend is living in Taiwan, and at this point whatever measures the authorities felt were appropriate under the family planning laws have already been taken against his girlfriend, and there is no indication from the background materials that any further measures would be taken against the respondent under the family planning laws of the his native country. Therefore, under this branch of his claim under the Convention Against Torture, a the respondent has failed to meet his burden of proof to show by a clear probability that he would face torture by the family planning officials because of a violation of the family planning laws.

For all of the above reasons, I have denied his applications for asylum, for withholding, and under the Convention Against Torture. Accordingly, the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that the respondent' s application under Section 208 of the Immigration and Nationality Act be, and the same is, hereby denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Section 241(b) (3) of the Act be, and the same is, hereby denied.

IT IS FURTHER ORDERED that the respondent's claim under Article 3 of the United Nations Convention Against Torture be, and the same is, hereby denied.

SARAH M. BURR
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE S-L-L-, RESPONDENT

Decided September 19, 2006

FOR RESPONDENT:
Stephen P. Gleit, Esquire,
New York, New York

FOR THE DEPARTMENT OF HOMELAND SECURITY:
William J. Howard,
Principal Legal Advisor

BEFORE: Board *En Banc*: OSUNA, Acting Vice Chairman; HOLMES, HURWITZ, GRANT, MOSCATO, MILLER, and HESS, Board Members. Concurring Opinion: PAULEY, Board Member. Concurring and Dissenting Opinion: FILPPU, Board Member, joined by COLE, Board Member.

HOLMES, Board Member:

The United States Court of Appeals for the Second Circuit has remanded this case with a request that we further explain our rationale in *Matter of C-Y-Z-*, 21 I&N Dec. 915, 919 (BIA 1997), "for construing IIRIRA § 601(a) to provide that the 'forced sterilization of one spouse on account of a ground

protected under the Act is an act of persecution against the other spouse' and that, as a result, the spouses of those directly victimized by coercive family planning policies are *per se* as eligible for asylum as those directly victimized themselves," and that we "clarify whether, when, and why boyfriends and fiancés may or may not similarly qualify as refugees pursuant to IIRIRA § 601(a)." *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 192 (2d Cir. 2005).[1]

I. FACTUAL AND PROCEDURAL HISTORY

The respondent, a native and citizen of the People's Republic of China ("PRC"), conceded removability in proceedings before the Immigration Judge but applied for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"). The respondent's asylum claim was based principally on the allegation that in September 1990 the PRC Government forced his girlfriend to abort their child. The respondent argued that we should extend to his case our decision in *Matter of C-Y-Z-*, *supra*, holding that an applicant whose spouse was forced to undergo an abortion or sterilization procedure may establish past persecution on account of political opinion.

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[1] The Second Circuit remanded two other cases in the opinion issued in *Lin v. U.S. Dep't of Justice*, *supra*. The remands in those cases will be addressed in separate decisions applying the law and reasoning set forth in this decision.

On May 9, 2000, an Immigration Judge reasoned that our holding in *Matter of C-Y-Z-* was limited to spouses and did not apply to an applicant whose girlfriend had been forced to undergo an abortion. Consequently, he denied the respondent's applications for asylum and withholding of removal, as well as his request for protection under the Convention Against Torture. On September 20, 2002, we affirmed the Immigration Judge's decision without opinion and the respondent appealed to the Second Circuit.

II. STATUTORY AND CASE LAW

In 1989, we held that implementation of the Chinese Government's "one couple, one child" policy did not constitute persecution on account of one of the five reasons enumerated in section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1982), even to the extent that involuntary sterilizations may occur. *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989). Following our holding in *Matter of Chang*, Congress amended section 101(a)(42) of the Act in 1996 to add the following provision to the definition of a "refugee":

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 601(a), 110 Stat. 3009-546, 3009-689 ("IIRIRA") (codified at section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (2000)).

In *Matter of C-Y-Z-*, *supra*, we held that a husband whose wife was forcibly sterilized could establish past persecution under this amendment to section 101(a)(42) of the Act. The position of the former Immigration and Naturalization Service, now the Department of Homeland Security ("DHS"), was that "an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition." *Matter of C-Y-Z-*, *supra*, at 917-18 (quoting Memorandum from the Office of the General Counsel of the Immigration and Naturalization Service 4 (Oct. 21, 1996)). In its brief, the Service stated that "the husband of a sterilized wife can essentially stand in her shoes and make a *bona fide* and non-frivolous application for asylum based on problems impacting more intimately on her than on him." *Id.* at 918. Given the agreement of the parties that the respondent could claim asylum based on his wife's sterilization under the amendment to section 101(a)(42), we did not provide the sort of detailed statutory analysis that would have been required had the issue been in dispute. Although *Matter of C-Y-Z-* involved a spouse's forced sterilization, the holding has been understood to apply to a spouse's forced abortion as well.[2]

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[2] *See, e.g.*, *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004), noting that "[t]he BIA and the courts have uniformly applied the statute's protections to husbands whose wives have

III. ANALYSIS

In its brief addressing the issues on remand, the DHS requests that we replace the rule adopted in *Matter of C-Y-Z-*, *supra*, with a case-by-case approach grounded in the "other resistance" clause of section 101(a)(42) of the Act. Under this approach, an applicant claiming persecution based on an abortion forced upon a spouse, girlfriend, or fiancée would have to show that he was targeted for persecution on account of his "resistance" to the family planning laws and that the resulting harm amounted to past persecution. The respondent's brief asks us to extend the holding of *Matter of C-Y-Z-* to boyfriends and fiancés whose partners were forced to abort a child.

As explained below, we reaffirm our holding in *Matter of C-Y-Z-*, but clarify its intended scope in two respects. First, we limit our holding to applicants who were, in fact, opposed to a spouse's abortion or sterilization. An applicant who encouraged or supported a spouse's abortion or sterilization, could not, in good faith, claim to have suffered harm amounting to persecution for purposes of asylum. Second, as discussed below, we limit our holding to applicants who are legally married under Chinese law.[3]

We decline to extend our holding in *Matter of C-Y-Z-*, as modified, to unmarried applicants claiming persecution based on a partner's abortion or

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(continued...)

undergone abortions or sterilization procedures, as well as to the wives themselves."

[3] No issue was raised in *Matter of C-Y-Z-*, *supra*, regarding the legality of the marriage.

sterilization. Rather, in such cases, the applicant must show, as discussed in Part III.B. below, that he or she qualifies under the terms of the "other resistance" clause in section 101(a)(42).

A. Forced Abortions Involving Married Couples

We begin by noting the obvious, that our decision in *Matter of C-Y-Z-*, *supra*, reflects the significant tensions inherent in the IIRIRA amendment to section 101(a)(42) of the Act. There is no clear or obvious answer to the scope of the protections afforded by the amendment to partners of persons forced to submit to an abortion or sterilization. The interpretive lines, no matter where drawn, will be vulnerable to criticism that they are overinclusive, under-inclusive, inadequately tied to statutory language, or unmanageable in practice. The DHS has a significant role in the adjudication of asylum and withholding of removal cases, and, particularly in that context, we took seriously the fact that the parties were in agreement as to the resolution of the issues presented. The fact that the parties agree is not determinative, but the result agreed upon by the parties in *Matter of C-Y-Z-*, as discussed below, was consistent with the focus of the amendment and the legislative history on the offensiveness of the PRC's use of forced abortions and sterilizations to implement its "one couple, one child" policy.

We also note at the outset that the position we articulated in *Matter of C-Y-Z-* in 1997 is a precedent of long standing at this point. The Attorney General recently rejected a request to review our decision, and numerous court decisions have deferred to the holding in *Matter of C-Y-Z-*. *See Matter of C-Y-Z-*, 23 I&N Dec. 693 (A.G. 2004). Most recently, rather than limiting the scope of protection afforded by the IIRIRA amendment, Congress

repealed the 1000 annual cap initially placed on the numbers of asylees who could be admitted pursuant to a finding of persecution under that provision. REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(g)(2),_119 Stat. 231, 305 (repealing former section 207(a)(5) of the Act, 8 U.S.C. § 1157(a)(5) (2000)). Had Congress believed that we had erroneously interpreted the amendment to section 101(a)(42), it seems unlikely that it would have removed the number limits on such grants, while leaving untouched our holding in *Matter of C-Y-Z-*.

The IIRIRA amendment to section 101(a)(42) of the Act does not explicitly refer to spouses in any of the three clauses describing the categories of persons deemed to have been subjected to political persecution. The lack of such a reference, however, does not necessarily preclude an applicant from demonstrating past persecution based on harm inflicted on a spouse when both spouses are harmed by government acts motivated by a couple's shared protected characteristic. For example, putting aside the amendment for a moment, if a government, as part of a campaign of persecution against members of a particular religious group, subjected married couples within that religious group to a policy of mandatory sterilization, the government's sterilization of either party to the marriage harms both individuals and is on account of the religion of both.[4] Although there is no specific reference in the statutory definition of a refugee to a husband's claim based on harm inflicted upon his wife, the general

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[4] *See Matter of Chang, supra*, at 44, indicating, prior to passage of the amendment, that past persecution could be established if there was evidence that coercive family planning practices were selectively applied against members of particular religious groups or for other grounds protected under the Act.

principles regarding nexus and level of harm apply in determining such a claim.[5]

We apply the same general principles requiring nexus and level of harm for past persecution in assessing a claim under the IIRIRA amendment. In so doing we also keep in mind the purposes for which Congress enacted the amendment, i.e., to afford refugee status to persons whose fundamental human rights were violated by a government's application of its coercive family planning policy. *See Yuan v. U.S. Dep't of Justice*, 416 F.3d 192, 195 (2d Cir. 2005) (citing *Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rights of the House Comm. on Int'l Relations*, 104th Cong. (1995)); *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 92 (2d Cir. 2001) (same); *see also Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (finding that "Congress's goal in passing the amendments [was] to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together" (citing H.R. Rep. No. 104- 469(I), at 174 (1996))).

In its brief, the DHS argues that the first two categories of persons deemed to have suffered past persecution under the terms of the IIRIRA amendment-those "forced to abort a pregnancy or to

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[5] The regulatory framework for establishing asylum eligibility provides that an applicant may qualify as a refugee by establishing that he or she either has suffered past persecution or has a well-founded fear of future persecution. Past persecution is established if the applicant "has suffered persecution in the past in the applicant's country of nationality ... on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution." 8 C.F.R. § 1208.13(b)(1) (2006).

undergo involuntary sterilization" and those who refuse to undergo such a procedure-are limited to the person directly subjected to the medical procedure or punished for refusing the medical procedure. Therefore, the DHS suggests that *Matter of C-Y-Z-* must be based on the "other resistance" clause of section 101(a)(42).

When considered in light of the reasons Congress expanded the refugee protections to include persecution based on coercive family planning, and the well-established principles regarding nexus and level of harm for past persecution, we understand the husband, as well as the wife, to have been subjected to the coercive family planning policy when the government forces an abortion on a married couple. Although the wife is obviously the individual subjected to the abortion procedure, Congress was concerned not only with the offensive assault upon the woman, but also with the obtrusive government interference into a married couple's decisions regarding children and family. When the government intervenes in the private affairs of a married couple to force an abortion or sterilization, it persecutes the married couple as an entity. We therefore find that Congress intended section 101(a)(42) to protect both spouses when the government has forced a married couple opposed to an abortion to submit to such a procedure.

The PRC Government explicitly imposes joint responsibility on married couples for decisions related to family planning. The Population and Family Planning Law, for example, provides that "*husband and wife bear common responsibility in implementing family planning.*" Population and Family Planning Law (adopted at the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective

Sept. 1, 2002), art. 17, *translated in* Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China-Profile of Asylum Claims and Country Conditions* 41 (Oct. 2005) [hereinafter 2005 *Profile*] (emphasis added).[6] A married couple may be subjected to social ostracism and pressures from Government officials to agree to submit to an abortion.[7] They may be threatened with fines, their property may be damaged or confiscated, and one or both spouses threatened with demotion, job loss, or other economic sanctions for refusing to agree to an abortion. If such efforts fail, an abortion may ultimately be imposed upon the couple.[8] Given the shared responsibility of husband and wife for decisions related to having a family and the PRC Government's treatment of the married couple as a

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[6] A translation of the 2001 Population and Family Planning Law is included as Appendix A to the 2005 *Profile*, *supra*. Article 49 of the 1982 Chinese Constitution similarly provides that both the husband and the wife have an obligation to practice family planning. *See* INS Resource Information Center, U.S. Dep't of Justice, *Profile Series, China: Family Planning Policy and Practice in the People's Republic of China*, PR/CHN/95.001A, at 2 (Mar. 1995). Article 12 of the 1980 Marriage Law also contains the explicit requirement that "[b]oth husband and wife shall have the duty to practice family planning." *Id.* at 6.

[7] The State Department notes that "[b]ecause penalties can be theoretically levied against a spouse's work unit or against local officials for allowing out-of-plan births, many individuals and organizations are affected, providing multiple sources of pressure on couples. The scope and intensity of the pressure often leave expectant mothers feeling that they have little choice but to undergo abortion." 2005 *Profile*, *supra*, at 21.

[8] The State Department reports that the "[c]entral government policy prohibits the use of physical coercion to compel persons" to submit to abortion or sterilization. However, "[r]eports of physical coercion continue to be heard." 2005 *Profile*, *supra*, at 21-22.

partnership with common responsibility for complying with the family planning laws, we are willing to presume, in the absence of evidence to the contrary, that the Government focuses on the married couple as a unit when it intervenes to force an abortion.

A forced abortion imposed on a married couple naturally and predictably has a profound impact on both parties to the marriage. Although a forced abortion does not entirely end a couple's procreative potential, the forced abortion, like sterilization, "deprive[s] a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them." *Matter of Y-T-L-*, 23 I&N Dec. 601, 607 (BIA 2003). A husband also suffers emotional and sympathetic harm arising from his spouse's mistreatment and the infringement on their shared reproductive rights. *Chen v. Ashcroft,* 381 F.3d 221, 225-26 (3d Cir. 2004). Local PRC Government officials understand this when they force a married couple to abort their prospective child. We find that such Government action is explicitly directed against both husband and wife for violation of the Government-imposed family planning law and amounts to persecution of both parties to the marriage.

As recognized in *Chen v. Ashcroft, supra*, the ruling in *Matter of C-Y-Z-* is plausibly based on "the assumption that the persecution of one spouse by means of a forced abortion or sterilization causes the other spouse to experience intense sympathetic suffering that rises to the level of persecution." *Id.* at 225. The impact of forced abortions or sterilizations on a husband and wife's shared right to reproduce and raise children is such that "the forced

sterilization of a wife could be 'imputed' to her husband, 'whose reproductive opportunities the law considers to be bound up with those of his wife.'" *Id.* at 226 (quoting *Lin v. Ashcroft*, 356 F.3d 1027, 1041 (9th Cir. 2004)).[9]

The DHS expresses concerns in its brief that the rule in *Matter of C-Y-Z* may open the door to asylum for husbands who were not, in fact, opposed to a spouse's abortion or sterilization or who actually encouraged a spouse to submit to an abortion or sterilization procedure. We clarify that our holding in *Matter of C-Y-Z-* was not intended to, and does not, include such cases. A husband who participated in attempts to persuade his wife to submit to an abortion, or who favored the abortion, could not, in good faith, claim to have been persecuted as a result of the abortion.

We do not require proof in the individual case that the local PRC Government officials involved were confronted by the husband or otherwise made aware of the husband's opposition. Rather, absent evidence that the spouse did not oppose an abortion or sterilization procedure, we interpret the forced abortion and sterilization clause of section 101(a)(42) of the Act, in light of the overall purpose of the amendment, to include both parties to a marriage.

In conclusion, we reaffirm *Matter of C-Y-Z-* with regard to married couples subject to the clarifications made by this decision. When parties have legally committed to marriage, we recognize the requisite nexus and level of harm for past

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[9] *Lin v. Ashcroft*, *supra*, was amended and superseded on denial of rehearing, but the quoted language remained in the amended decision. *See Jie Lin v. Ashcroft*, 377 F.3d 1014, 1030 (9th Cir. 2004).

persecution when a spouse is forced to undergo an abortion or sterilization procedure.

B. Boyfriends, Fiancés, and Other Unmarried Partners

The second question to be addressed on remand is whether boyfriends and fiancés should qualify for refugee status under the IIRIRA amendment to section 101(a)(42) of the Act in the same manner as an applicant whose spouse is subjected to a forced abortion or sterilization. As explained below, we decline to extend *Matter of C-Y-Z-* to an applicant whose claim is that his girlfriend or fiancée was subjected to a forced abortion.

Matter of C-Y-Z- relies on marriage as the linchpin. In the absence of proof to the contrary, we recognize, in the case of a husband opposed to a spouse's abortion, that the loss of the child and the interference with the couple's reproductive rights, is harm to both spouses amounting to past persecution. We do not find convincing reasons to extend the nexus and level of harm attributed to a husband who was opposed to his wife's forced abortion to a boyfriend or fiancé.

As indicated above, the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father. From the point of view of the wife, the local community, and the government, a husband shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives than does a boyfriend or fiancé for the resolution of a pregnancy of a girlfriend or fiancée.

Several circuit courts have deferred to unpublished Board decisions refusing to extend the holding in *Matter of C-Y-Z-* to unmarried partners. *See, e.g., Chen v. Gonzales*, 457 F3d. 670, 674 (7th Cir. 2006) (declining to extend the definition of "refugee" to reach boyfriends). *Chen v. Ashcroft, supra* (holding that an applicant whose fiancée was forced to have an abortion was not protected under *Matter of C-Y-Z-*); *Wang v. U.S. Att'y Gen.*, 152 Fed. Appx. 761 (11th Cir. 2005) (recognizing that a forced abortion or sterilization may not be imputed beyond the marital relationship). The Third Circuit explains in *Chen v. Ashcroft, supra*, at 227, that *Matter of C-Y-Z-* "uses marital status as a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance of a forced abortion or sterilization on another person."[10] While recognizing that the classification is "both over- and under-inclusive," the court in *Chen* noted that benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the Immigration and Nationality Act that "it would seem absurd to characterize reliance on marital status in *C-Y-Z-* as arbitrary and capricious." *Id.* at 227 n.6.

We recognize that drawing the line at marriage is not an exact measure of either nexus or level of harm. Requiring marriage, however, is a practical

[10] In *Chen*, after the applicant's fiancée became pregnant, they applied for a marriage license but were turned down because they could not meet the minimum age requirements. After a confrontation with local planning officials, Chen left China for the United States. Once here, he learned that his fiancée had been found and forced to have an abortion. He sought asylum based on his fiancée's forced abortion.

and manageable approach which takes into account the language and purpose of the statutory definition in light of the general principles of asylum law. In the absence of a legal marriage, evaluating the existence of the requisite nexus is problematic, both as to whether the applicant was, in fact, the father of the child and as to whether local officials considered him responsible, or were even aware of his involvement.[11] As the court in *Chen* recognized, "[A] rule extending *C-Y-Z-* to non-spouses would create numerous practical difficulties that the BIA might reasonably have chosen to avoid." *Chen v. Ashcroft, supra*, at 228. Proof or presumption of paternity, for example, may be considerably more difficult when a boyfriend claims to have fathered a child who was forcibly aborted by government officials. For all of the reasons identified above, we do not extend the approach of *Matter of C-Y-Z-* to boyfriends or fiancés.

That the holding in *Matter of C-Y-Z-* is limited to legally married spouses does not mean that an unmarried applicant may never demonstrate past persecution in the context of a partner's forced abortion or sterilization. As the DHS acknowledges

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[11] As the court in *Chen* noted, "[T]he BIA might also have been concerned that unmarried asylum-seekers would falsely claim to have had an intimate relationship with a person who suffered a forced abortion or sterilization, and the BIA might have felt that it would be too difficult to distinguish between those unmarried persons who had a truly close relationship with the person who underwent the medical procedure and those unmarried asylum seekers who did not." *Chen v. Ashcroft, supra*, at 229 (footnotes omitted). In enacting the coercive family planning protections, members of Congress expressed concern that "young Chinese single-unmarried-males" might take advantage of the amendment to the "refugee" definition in section 101(a)(42) of the Act. 142 Cong. Rec. S4592, S4593 (1996) (statement of Sen. Simpson), 1996 WL 220426.

in its brief, there may be cases in which an unmarried partner in an extremely close and committed relationship may demonstrate persecution based on the clause referring to "other resistance to a coercive population control program."

The term "resistance" is not defined in the Act. The ordinary meaning of "resistance," however, is "an act or instance of resisting" or "opposition." *Merriam Webster's Collegiate Dictionary* 994 (10th ed. 2002). To "resist" is "to exert force in opposition," "to exert oneself so as to counteract or defeat," or "to withstand the force or effect of." *Id.* In the context of coercive family planning, the term "resistance" covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law.

In addition to meeting the nexus requirement based on "resistance" to the family planning law, an applicant claiming persecution based on an unmarried partner's abortion must demonstrate that he has suffered harm amounting to persecution on account of that resistance. According to the DHS, the relevant factors to be considered in identifying such cases may include whether the couple "has children together, has cohabited for a significant length of time, holds themselves out to others as a committed couple, has taken steps to have their relationship recognized in some fashion (perhaps having taken such steps repeatedly, as where permission to marry has been denied by authorities [based on failure to meet the minimum age requirements]), is financially interdependent, and [whether] persuasive objective evidence of that relationship's continued existence

during the time that the applicant has been in the U.S. is presented."

IV. RESPONDENT'S ASYLUM CLAIM

The respondent is a 41-year-old citizen of the PRC. His asylum application provides the following account of events which occurred prior to his January 1991 entry to the United States.[12] After "going steady" for about 2 years, the respondent's girlfriend, then age 18, told the respondent that she "felt like being pregnant." They requested a marriage license but were turned down because the respondent's girlfriend was under the required age for marriage. After the respondent's girlfriend became pregnant, they sought permission from local family planning officials to have the child. This request was also denied and they were told that they "must have an abortion." Two days later the respondent's girlfriend was "forced to the hospital." After the abortion, they made plans to travel to the United States, but when the time came his girlfriend was "too weak" to travel, and the respondent came to the United States on his own. The respondent also indicated that he feared that he would be "put in prison for leaving the country without permission."

As explained in Part III.A. above, we decline to extend *Matter of C-Y-Z-* to unmarried couples. We therefore examine whether the facts alleged by the respondent demonstrate that he was persecuted

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[12] The Immigration Judge and the parties agreed to accept the truth of the events recounted in the asylum application without taking testimony from the respondent. *See Matter of Fefe*, 20 I&N Dec. 116, 119 (BIA 1989) (stating that in lieu of hearing testimony, the parties may stipulate that an "applicant's written statement is believable and that the applicant could have presented oral testimony consistent with that statement").

based on "other resistance" to the family planning laws. The respondent's conduct relevant to the family planning policy includes impregnating his underage girlfriend, seeking permission to marry outside the age requirements for marriage, and seeking permission to have the child outside the age requirements for having children. The respondent did not otherwise claim to have expressed opposition or resistance to his girlfriend's abortion or the family planning regime.

Merely impregnating one's girlfriend does not constitute an act of resistance under the family planning laws within the meaning of section 101(a)(42) of the Act. *See Zhang v. Ashcroft*, 395 F.3d at 531, 532 (5th Cir. 2004). In some cases a pregnancy may have been unplanned or even unwanted. The respondent merely asserts that his girlfriend "felt like being pregnant." The respondent's requests for permission to marry and to have a child outside the age limits are likewise insufficient to indicate resistance to coercive family planning laws. Rather, the respondent appears to have attempted to comply with the law by seeking an exception to the usual age requirements. Once permission was denied, he did not take steps to avoid or prevent the abortion that might have been perceived as "resistance."

The respondent asserts that he should be afforded asylum because he and his girlfriend were denied permission to marry and bear a child based on the minimum age requirements of the Chinese family planning law.[13] He argues that but for the minimum

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[13] Under PRC law, no marriage may be contracted before the man is age 22 and the woman is 20. 2005 *Profile*, *supra*, at 22. An underage couple living in an unregistered de facto marital relationship is not recognized as a married couple by the

age requirements, he and his girlfriend would have married and, therefore, *Matter of C-Y-Z-* should apply to his case. In *Chen v. Ashcroft, supra*, the Third Circuit rejected the argument that persons who would have married but for the minimum age laws must be included within the scope of *Matter of C-Y-Z-*. The court reasoned that however sympathetic such arguments might be, there are rational reasons, as discussed above, for limiting *Matter of C-Y-Z-* to couples who have actually committed to a marital relationship. *See Chen v. Ashcroft, supra*, at 232. For the reasons indicated above, we require that an applicant have entered into a legally recognized marriage in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*.[14] The respondent in this case has not demonstrated that he has been persecuted on account of resistance to the PRC Government's family planning policy. In regard to future persecution, he has not asserted or demonstrated a well-founded fear of future harm based on application of the coercive family planning law or policy. He indicated only that he feared he would be imprisoned for departing China without

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(continued...)

Government, and the parties to such a relationship do not have the legal rights and obligations of a married couple. Regulations on Control of Marriage Registration (adopted by the State Council, Jan. 12, 1994, and promulgated by Decree No. 1 of the Ministry of China, Feb. 1, 1994), art. 24, http://english.gov.cn/2005-07/29/content_18376.htm.

[14] We recognize that two circuit courts have decided to the contrary when an underage couple has entered into a traditional marriage ceremony. *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006); *Ma v. Aschroft, supra*.

permission.[15] The fact that a country may punish a citizen for an illegal departure, however, does not generally qualify an alien for refugee protection. *See Li v. INS*, 92 F.3d 985, 988 (9th Cir. 1996); *Matter of Sibrun*, 18 I&N Dec. 354, 359 (BIA 1983). Therefore the respondent has not demonstrated eligibility for asylum or for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3) (2000).

We also agree with the Immigration Judge that the respondent failed to demonstrate that he would more likely than not be tortured, as that term is defined by the regulations implementing the Convention Against Torture, were he to be returned to China. 8 C.F.R. §§ 1208.16(c), 1208.18(a) (2006). The core events in this case occurred over 15 years ago and the respondent has not demonstrated that the Chinese Government will likely subject him to mistreatment rising to the level of torture. We will therefore dismiss the respondent's appeal from the Immigration Judge's decision.

ORDER: The respondent's appeal is dismissed.

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[15] In the notice of appeal, the respondent's attorney wrote that the respondent's elder brother was killed while trying to intervene to prevent the girlfriend's abortion. No such incident was included in the respondent's asylum application or mentioned in proceedings before the Immigration Judge, where the respondent had an opportunity to supplement the information in the asylum application. The respondent's brief on appeal did not further address this unsupported allegation. Nor has the respondent provided an amended asylum application or proffered supporting evidence, or even a statement, explaining the basis of his knowledge of this incident and why he did not include such information in his asylum application. Under these circumstances, we do not find any reason to remand for consideration of evidence which, if it exists, has not been shown to have been unavailable during the proceedings below.

Chairman Lori L. Scialabba did not participate in the decision in this case.

CONCURRING OPINION: Roger A. Pauley

I respectfully concur. I agree with the majority that nothing in the Immigration and Nationality Act supports the extension of derivative asylum eligibility, under *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), to unmarried partners of a man or woman forcibly sterilized or aborted. However, I disagree with the majority's determination to "reaffirm" *Matter of C-Y-Z-*, *supra*. Were we writing on a clean slate, I would adopt the lately arrived at position of the Department of Homeland Security ("DHS") that whether or not the spouse of a forcibly sterilized or aborted individual can be found to have been persecuted depends on a case-by-case assessment of whether that spouse was persecuted on account of "other resistance" to a coercive population control system, because the language of the Act does not support extending refugee status to any person other than the one sterilized or aborted, aside from the "other resistance" ground. In other words, I would hold that the DHS's original theory, accepted without analysis by the Board in *Matter of C-Y-Z-*, *supra*, at 918, that the spouse "stand[s] in [the] shoes" of the other spouse who was persecuted, is not sustainable. I have previously had occasion to voice doubts about the correctness of *Matter of C-Y-Z-* on the basis on which it was then decided, noting among other things that Congress's choice to put coerced population control claims in the category of "political opinion," rather than to create a unique and separate ground, was inconsistent with a general theory of derivative asylum eligibility.[16] *See*

[16] That theory has spawned other derivative claims, of dubious merit in my view, e.g., involving applicants who claim that

Matter of Y-T-L, 23 I&N Dec. 601, 618-20 (BIA 2003) (Pauley, dissenting).

However, notwithstanding my belief that *Matter of C-Y-Z-*, *supra*, was wrongly decided, I would not overrule it now, nearly a decade later and in the aftermath of thousands of decisions applying it to grant asylum on a derivative basis. Stare decisis is an important principle for any adjudicative body, whether a court or an appellate administrative agency such as the Board. Thus, for many of the same reasons as undergirded my separate opinion in *Matter of Assaad*, 23 I&N Dec. 553, 569-71 (BIA 2003) (Pauley, concurring), I would find that given the almost universal acceptance of *Matter of C-Y-Z-* and the extensive degree of reliance thereon, it is too late in the day for the Board to upset the applecart and reach a different conclusion.[17] It is, however,

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(continued...)

their children may experience female genital mutilation ("FGM"). *See, e.g., Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004). While FGM may be a pernicious form of persecution, it is difficult to understand why a fear that it may be performed on *another person*, albeit one's child, is a ground for asylum, any more than if a parent had a fear that a child would be singled out for persecution on account of political opinion, race, or religion.

[17] I note that were the Board to overrule *Matter of C-Y-Z-*, *supra*, the DHS could seek termination of asylum under section 208(c)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(c)(2)(A) (2000), on the basis of a "fundamental change in circumstances." Whether a change in the Board's interpretation of the Act is a "fundamental change in circumstances" contemplated by the statute and regulations is an open question. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004) (implicitly treating a change in United States asylum law as a "change in circumstances" under another regulation); *cf. also Matter of Y-T-L-*, *supra*, at 604-05.

another thing to *extend* an untenable approach to afford asylum to additional thousands, or tens of thousands, of potential applicants as would result from applying *Matter of C-Y-Z, supra,* to unmarried partners of the victims of a coercive population control regime. For the reasons set forth in Part III.B. of the majority opinion, I concur in the result in this case.

CONCURRING and DISSENTING OPINION: Lauri Steven Filppu, Board Member, in which Patricia A. Cole, Board Member, joined

I concur in the result, but I respectfully dissent from the majority's reaffirmation of the "joint spousal persecution" theory announced in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997).

In *Matter of C-Y-Z-, supra,* we accepted, without any statutory analysis, the parties' agreed view that the spouse of a forcibly sterilized woman qualified in his own right as a "refugee" because of past persecution. We merely explained that this "position is not in dispute," thereby implicitly endorsing the stated view of the former Immigration and

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(continued...)

I also take into account, as does the majority, Congress's recent elimination of the annual cap for persons found eligible for asylum for having been persecuted on the basis of a coercive population control program. However, I do not read into this elimination congressional *approval* of *Matter of C-Y-Z-*, but instead merely a practical recognition that, over the years, the unrealistically low cap had produced an unhealthy backlog of applicants awaiting permanent asylee status, including those women and men who *themselves* had been forcibly sterilized or aborted.

Naturalization Service ("INS") "'that the husband of a sterilized wife can essentially stand in her shoes and make a *bona fide* and non-frivolous application for asylum based on problems impacting more intimately on her than on him.'" *Id.* at 918 (quoting INS brief). Despite the absence of an explicit "stand in the shoes" clause in the statute, this understanding of the law has gone largely unchallenged since 1997 and has routinely been applied in both forced sterilization and forced abortion contexts.

Today, however, we do face a challenge to the "stand in the shoes" theory. The Department of Homeland Security ("DHS") disavows the prior position of its predecessor, the INS, and instead argues for an interpretation based on the actual language of the statute. Importantly, the United States Court of Appeals for the Second Circuit remanded this very case for us to explain why "the spouses of those directly victimized by coercive family planning policies are *per se* as eligible for asylum as those directly victimized themselves," in part because the decision in *Matter of C-Y-Z-*, *supra*, "never ... identified the specific statutory language pursuant to which it deemed spouses eligible for asylum." *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 191, 192 (2d Cir. 2005). These powerful entreaties for a reading grounded in statutory text are consonant with the vast body of case law declaring that statutory interpretation must begin with reference to the language and structure of the statute-the paramount indicia of legislative intent. *E.g., INS v. Cardoza-Fonseca,* 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

In the face of all this, the majority's opinion fails to discuss "the specific statutory language"

supporting the "stand in the shoes" theory it reaffirms. The majority admits that none of the clauses of the statute explicitly refers to spouses in describing the categories of persons subjected to qualifying persecution. *Matter of S-L-L-*, 24 I&N Dec. 1, 5 (BIA 2006). It then interprets the "forced abortion and sterilization clause" of the statute "to include both parties to a marriage" as long as the husband opposed the abortion. *Id.* at 8. But it does so "in light of the overall purpose" of the coercive population control amendment. *Id.* The majority never explains how the actual text of the statute supports its construction, or even how that text is actually ambiguous on the question of covering married couples, as opposed to all couples or just individuals.

The literal language of the statute, however, is contrary to the majority's ruling. As the DHS convincingly argues, the statute plainly focuses on "a person" who has been forced to abort a pregnancy, not on a "couple," let alone a married couple, or, in the majority's terms, "both parties to a marriage." *Matter of S-L-L-*, *supra*, at 8. The statute as a whole reinforces the ordinary meaning of "a person." In ordinary English usage, couples do not "undergo" medical procedures; only an individual will "undergo such a procedure." That "procedure," of course, is the forced abortion or sterilization. If this were not enough, the natural meaning of "a person" is inescapably clarified by the clause addressing "*a person* who has a well founded fear that *he or she* will be forced to undergo such a procedure." Section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2000) (emphasis added). "[H]e or she" cannot reasonably be read to cover married couples.

Departures from literal text are warranted to correct scrivener's errors or to avoid absurdity, for example. Clarification and interpretation are justified to fill statutory gaps and resolve ambiguities. But exceptions such as these compel analysis and explanations founded first and foremost on statutory text. In no case do they justify avoiding a meaningful discussion of literal statutory language.

The majority claims no scrivener's error or absurdity to support joint spousal persecution. It does assert statutory ambiguity by claiming that "*Matter of C-Y-Z-*, *supra*, reflects significant tensions inherent" in the statute, and that all "interpretive lines" will be subject to criticism as "inadequately tied to statutory language." *Matter of S-L-L-*, *supra*, at 4. But it never explains where any ambiguity lies in the text of the law itself.

To the extent that "significant tensions" exist, I believe they were *caused by* our decision in *Matter of C-Y-Z-*, not reflected in it. The parties agreed to the result, and we simply adopted that agreement without any independent analysis. *Matter of C-Y-Z-*, *supra*, at 918. The tension that exists is between *Matter of C-Y-Z-* and the statute, not within the statute itself.

The majority invokes what it terms "well-established principles regarding nexus and level of harm" to say that both spouses automatically qualify when one is aborted. *Matter of S-L-L-*, *supra*, at 6. It claims that China "persecutes the married couple as an entity" when it "intervenes in the private affairs of a married couple to force an abortion or sterilization" *Id.* This might well provide some support for the spouse of an abortion victim to advance a claim under the "other resistance" clause

of the statute. It is not a basis, however, for treating that spouse as being the one who has undergone the abortion itself, as is the clear requirement of the "forced abortion and sterilization" clause.

The DHS actually argues for a focus on the "other resistance" clause when it comes to the independent qualification of a spouse who lacks a direct "forced abortion or sterilization" claim. All indications are that the majority rejects such a focus when it adopts an automatic entitlement rule for spouses in general. But it then proceeds to qualify its own "interpretation" to exclude any husband who was not, in fact, opposed to his wife's abortion. The separate views of a husband and wife on this subject would seem to qualify as "the private affairs of a married couple," as much as would jointly held views. And unless China actually knows of an otherwise private family dispute, it is impossible to understand how it intends to punish "the married couple as an entity" only in those cases where there is joint opposition to the abortion.

I agree that relief should not be available to a husband who favors an abortion his wife is forced to endure. But that is because such a husband has neither resisted China's coercive population control program nor suffered persecution from the abortion. "Family entity persecution," however, is simply a creative construct for deeming a husband to be "a person" who has undergone a forced abortion without any grounding in the statutory language itself.

The clearly applicable "general principle" as to spouses is already embodied in sections 207(c)(2) and 208(b)(3) of the Act, 8 U.S.C. §§ 1157(c)(2) and 1158(b)(3) (2000 & Supp. II 2002), according *derivative* status to spouses and children of aliens

who qualify as refugees or for asylum. Each spouse to a marriage may well be able to show independent grounds for asylum as a principal in a given case, and that ground could be identical in some cases. But there is no general rule that the persecution of one spouse is imputed to the other such that both are independently deemed to qualify for relief.

Any legislative goal of *automatically* benefitting spouses is already accomplished in removal cases through the ordinary derivative asylum provisions of section 208(b)(3) of the Act. Congress, after all, placed its "coercive population control" amendment within the confines of the broader refugee and asylum statutes. Nothing in the language of that amendment suggests that it was intended to supersede or obviate derivative status for spouses in the abortion and sterilization context. Reliance on "derivative status" may not benefit every husband who can get asylum under the majority's approach, particularly those whose marriages have ended in death or divorce.[18] But, I am at a loss to understand the imperative, absent identifiable statutory text, to accord refugee status to men who have undergone no coercive procedure and who have left behind their forcibly aborted or sterilized wives.

The majority also defends its rule by saying that *Matter of C-Y-Z-* is a long-standing precedent left untouched by the Attorney General, that Congress changed the annual cap for affected asylees without questioning *Matter of C-Y-Z-*, that some spouses can be persecuted together in other contexts, and that Congress's goal was to protect couples.

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[18] Derivative status would also be unavailable for those aliens who only qualify for withholding of removal, given the lack of derivative eligibility in that context.

I make no claim that the considerations noted by the majority can never be relevant. But resort to such factors is only appropriate if the "forced abortion and sterilization" clause, when read in the context of the statute as a whole, is reasonably ambiguous on whether "a person" includes married couples. Further, I have already explained why the derivative refugee and asylum statutes should control any *automatic* benefit accorded spouses, as this is the long-standing statutory basis for providing benefits to spouses who were not themselves the direct recipients of persecution.

The Attorney General's refusal to review *Matter of C-Y-Z-*, moreover, does not justify *our* refusal to confront the text of the statute when we are called upon to do so by both a party and the court remanding this very case to us. The repeal of the statutory cap for "coercive population control" refugees may well reflect no dissatisfaction with *Matter of C-Y-Z-*. But it does not contain an express endorsement either. Indeed, there is precious little in *Matter of C-Y-Z-* to endorse, other than a bottom line, perhaps, given that the decision itself fails to contain any statutory analysis for Congress to accept or reject. It gives no guidance on how to address "boyfriend" cases, such as the one presently before us, let alone "traditional marriage" or divorce cases. Most importantly, if the actual statute does not support the result in *Matter of C-Y-Z-*, we simply have no authority to amend the statute just because the Attorney General and Congress have failed to object.

The majority's discussion of legislative history may also be incomplete; it cites to case law construing that history rather than directly to the history itself. The DHS in its appeal brief, on the

other hand, cites directly to portions of that history in arguing that Congress was focused on women, not on men, when it came to forced abortions. *E.g.*, *Coercive Population Control in China: Hearings before the Subcomm. on Int'l Operations & Human Rights of the House Comm. on Int'l Relations,* 104th Cong. 1 (1995) (statement of Rep. Christopher Smith). I find it unnecessary to join this battle, beyond noting that the statute, when read in context, is sufficiently clear as to the meaning of "a person" and that nothing in the legislative history reflects a "'clearly expressed legislative intention,' contrary to [the statutory] language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, *supra*, at 432 n.12 (quoting *United States v. James*, 478 U.S. 597, 606 (1986)).

The fundamental flaw in the majority's approach-its failure to analyze precise statutory text-is further illustrated in its treatment of "boyfriends, fiancés, and other unmarried partners." Relying on its construct of family entity persecution, the majority crafts a rule that treats a father as "a person who has been forced to abort a pregnancy" if the father is both legally married to the woman who was forced to undergo such a procedure and if the father opposed the abortion. The majority never explains, however, how a father ceases to be "a person" forced to abort a pregnancy when it comes to unmarried partners. Instead, the majority advances a series of policy reasons for "drawing the line at marriage," *Matter of S-L-L-*, *supra*, at 9, and for refusing to extend to a boyfriend or fiancé "the nexus and level of harm" it attributes to a husband. *Id.* Its policy explanations are not without reason. But its entire discussion is

only necessary because of the underlying rule it invents in the first place.

The majority's creation of, and restrictions on, its rule of family entity persecution would appear to resolve the cases of most married couples, "traditionally" married couples, and never married couples. But, I see no clear answer emerging as to divorced couples. Does the rule apply if a forced abortion or sterilization took place before the divorce, even if the husband now has children with his second wife? Does it apply if the divorce preceded a forced abortion or sterilization, even if it was the husband's child that was aborted? In this respect, does a father suffer "family entity" persecution if China recognizes a divorce that extinguishes that very entity before it even learns the woman is carrying the father's child?

For the reasons set forth earlier, I agree with the DHS that the statute does not permit the spouse of "a person forced to abort a pregnancy" to establish refugee status in his own right simply by virtue of the marital relationship. Instead, "a person" who has not suffered, or who will not and has not been placed in jeopardy of suffering, a forcible abortion or sterilization procedure can qualify for this sort of refugee status only if he proves that he was persecuted, or has a well-founded fear of future persecution, "for other resistance to a coercive population control program."

As DHS also persuasively argues, the word "for" in the "other resistance" clause means "because of," such that this resistance is the reason why the persecution is inflicted or feared. Thus, if the Chinese Government would forcibly abort a woman regardless of the views or actions of her husband, it

may become difficult for the husband to show that the abortion was because of his resistance.

A coercive abortion that is performed against a woman in simple pursuance of the population control policy, and that would have been performed in any event, would qualify as persecution of the woman upon whom it is performed under the plain language of the statute. But, it would not automatically qualify as persecution of her husband or boyfriend, even if he adamantly resisted it and was emotionally harmed by it, unless he can show that it was motivated by (i.e., was "for") his resistance. However, a person who is imprisoned or whose livelihood is lost through governmental action or who is subjected to other forms of economic detriment or physical harm could qualify for refugee status under the "other resistance" clause if these injuries were sufficiently severe and were motivated by his acts or statements in opposition to the coercive population control program, or to its enforcement in a particular case.

The majority evidently reaches the same result on this point in relation to unmarried partners. It declares that "[m]erely impregnating one's girlfriend does not constitute an act of resistance" as "a pregnancy may have been unplanned or even unwanted." *Matter of S-L-L-*, *supra*, at 11. In some cases, however, I think a planned pregnancy could well be viewed as an act of "resistance." The question then becomes the motivation for any termination of that pregnancy, that is, did the Chinese Government intend the forced abortion to be a measure of harm to the father because of *his* resistance. Some of the points made by the majority may support a husband's claim under the "other resistance" clause, at least to the extent that China deems both parties

to a marriage to share birth control responsibilities. We do not now face the claim of a husband, however, and are only required by the Second Circuit's remand to explain why spouses may (or, in my opinion, may not) automatically qualify for relief without being direct victims of forced abortions or sterilizations, and then to address the scope of the statute in relation to a boyfriend.

In the latter respect, the respondent presently before us does not qualify. He has not been forced to abort a pregnancy or to undergo involuntary sterilization and has not disobeyed a governmental command that he do so; he has no well-founded fear that either an abortion or sterilization procedure will be performed on him in the future; and he has adduced no evidence that he offered discernible "resistance" to the enforcement of the coercive population control program in general, or to its enforcement against his former girlfriend, who remains in China. Accordingly, even if his girlfriend's involuntary abortion was perceived as a grievous loss by him, it was not persecution inflicted because of his resistance to the coercive population control program. Moreover, he has not shown that any mistreatment he fears upon return to China would be "for" such resistance.

Turning now to Board Member Pauley's concurring opinion, I note that he acknowledges that the joint spousal persecution theory underlying *Matter of C-Y-Z-*, *supra*, has no basis in the statutory language, but he nonetheless justifies adherence to that theory on grounds of stare decisis. Respect for prior decisions is an important consideration. But Board Member Pauley's view would elevate stare decisis to the power to rewrite the law, simply because the parties once agreed and we published

that agreement. The Board is an administrative body. Our precedents are subject to the legal rulings of the Attorney General and the courts.

The Second Circuit has asked us to explain the statutory grounding for *Matter of C-Y-Z-*, *supra*, in this case. It is no answer that our precedent lacks any such grounding, but we adhere to it anyway because we announced it nearly 10 years ago. And I fail to see any justifiable reliance on our precedent by males in China who come to the United States without their forcibly aborted wives, often through costly and dangerous smuggling schemes. In these circumstances, stare decisis is an insufficient basis for defending our rule as against the law enacted by Congress, and conforming to that law is surely a sound reason for departing from past precedent. In short, we have no authority to invent our own version of the law.[19]

In sum, the "joint spousal persecution" or "stand in the shoes" theory has no basis in the text of the statute, and we should repudiate it. Males lacking their own sterilization claims can independently qualify only under the "other resistance" clause, if at all. Otherwise, husbands are fully entitled to pursue derivative status based on any refugee determinations accorded their wives. I agree with the majority's ultimate ruling that the respondent has not demonstrated that he was persecuted in the

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[19] We are not now concerned with reopening past cases. Instead, as I see it, we must decide whether to continue dispensing an automatic benefit not authorized by law and, if so, whether to extend that same unauthorized automatic benefit to an additional category of persons not covered by the statute. Attempting to draw lines between categories of ineligible applicants is a precarious business, assuming it can ever be justified.

past for his "resistance" to the Chinese coercive population control program or that he has a well-founded fear that he will be persecuted for such resistance in the future. The majority thus correctly dismisses the appeal, but it seriously errs in perpetuating a rule that finds no support in the text of the law.

United States Department of Justice
Board of Immigration Appeals

IN RE C-Y-Z-, Applicant

Decided June 4, 1997

Before: Board En Banc: SCHMIDT, Chairman; DUNNE, Vice Chairman; HEILMAN, HOLMES, HURWITZ, COLE, MATHON, and GUENDELSBERGER, Board Members. Concurring Opinion: ROSENBERG. Concurring and Dissenting Opinion: FILPPU, Board Member. Dissenting Opinions: VACCA, Board Member; VILLAGELIU, Board Member.

HEILMAN, Board Member:

The applicant, a native and citizen of the People's Republic of China, has timely appealed from the Immigration Judge's denial of asylum and withholding of deportation. The appeal will be sustained.

I FACTS

The applicant is a native and citizen of the People's Republic of China who arrived in this country on April 23, 1993. He was married in China on October 25, 1986,[1] and is the father of three children, two daughters born on July 31, 1988, and March 18, 1990, and a son born on April 14, 1991. The applicant claimed in his asylum application that he was persecuted in China on account of his opposition to China's birth control policies. He

[1] He testified, however, that he did not register his marriage until 1991.

claimed in a supplemental affidavit to his asylum application that, after the birth of his first child, his wife was forced to obtain an intrauterine device ("IUD") in September 1988, and that when he protested, he was arrested and detained for 1 day. The IUD was later removed, and his wife became pregnant a second time. The applicant stated that his wife was ordered to undergo an abortion in January 1990, but avoided doing so by hiding with relatives. The applicant and his wife returned home for the child's birth. On May 8, 1990, they were fined 2,000 yuan. The applicant stated that he paid the fine to avoid having his house destroyed by birth control cadres.

The applicant then testified that his wife became pregnant a third time because they wanted a son, and that he and his wife once again hid to avoid detection. They also returned home in time for his wife to give birth. After the birth of the third child, the applicant's wife was forced to be sterilized against her will on May 25, 1991. The applicant left China approximately 18 months after his wife's sterilization. In support of his application, the applicant submitted unauthenticated copies of the following documents: a certificate that his wife was sterilized, a document showing that he was fined, a marriage certificate, birth certificates for his children, and a copy of his household registry.

II. IMMIGRATION JUDGE'S DECISION

The Immigration Judge did not make an adverse credibility finding in this case. He stated that "(p)utting aside any questions I might have as to whether the applicant has been completely truthful about the actual facts in the case, whether he has told the truth, whether he has lied, whether he has embellished or puffed the story to make it seem more

than it is," it appeared only that the Chinese Government "put some roadblocks in this applicant and his wife's way in having their family," but that ultimately, they were able to do so with only a minimal fine. Although the Immigration Judge mentioned the fact of the forced sterilization procedure, he noted only that the applicant had no other problems in China, and that "(c)ertainly his wife, if indeed she was forced to undergo an involuntary sterilization, did not gain anything from having the applicant abandon her and the children for the United States." The Immigration Judge concluded that nothing specific had happened to this applicant other than a threat of arrest and a brief 1-day detention, and that, "(i)n effect, the applicant seeks to ride on his wife's coattails or claim asylum because of alleged adverse factors to his wife, including forced sterilization. He, himself, has never been persecuted and he cannot show either past persecution or a reasonable fear of future persecution."

We note that the Immigration Judge's decision that the applicant had not been a victim of past persecution or a member of a group protected under the Immigration and Nationality Act was consistent with the Board's decision in *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989). However, subsequent to the Immigration Judge's decision, the law was amended to specifically address coercive family planning practices in the context of applications for asylum, and *Matter of Chang*, *supra*, has been superseded by our recent decision in *Matter of X-P-T-*, Interim Decision 3299 (BIA 1996), which is discussed below.

III. SECTION 601(A) OF THE IIRIRA

During the pendency of this appeal, section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA"), was enacted on September 30, 1996. Section 601(a) amended the refugee definition of section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (1994), by adding the following sentence:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

This Board subsequently determined in Matter of X-P-T-, supra, that an alien who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for resistance to a coercive population control program, has suffered past persecution on account of political opinion and qualifies as a refugee within the

amended definition of that term under section 101(a)(42) of the Act.

IV. ISSUE

The threshold issue on appeal is whether the applicant in this case can establish past political persecution based upon his wife's sterilization. If so, we then must determine whether, without more, the applicant has established statutory eligibility for asylum in the absence of changed country conditions.

V. SERVICE'S POSITION

The position of the Immigration and Naturalization Service is that past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse. The Service specifically stated in a memorandum of October 21, 1996, entitled "Asylum Based on Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996," that "an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition." Memorandum from the Office of the General Counsel of the Immigration and Naturalization Service 4 (Oct. 21, 1996) (hereinafter Memorandum). The Service also conceded this fact in its brief on appeal in this case, stating, "The Service is aware that its legal perspective as directed by the General Counsel is that the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him." The Service asserted, however, that an alien who has established past persecution may or may not be able

to establish a well-founded fear of future persecution. In its brief the Service relied on the memorandum, which stated: "If the applicant does not have a well-founded fear of future persecution, he would only merit a favorable exercise of discretion . . . if the abortion or involuntary sterilization is determined to be an atrocious form' of persecution to the applicant." Memorandum, supra, at 4. The Service then argued that this case is distinguishable from Matter of X-P-T-, supra, because the documents submitted were not authenticated, and that there were other factors which impacted on the applicant's credibility, noting, "(F)or example, the IJ was not convinced of the necessity of fleeing China because the harm, if any, that had occurred has ceased and did not impact directly against the person of the applicant." In addition, the Service also stated that there was no evidence in the record which alleged "that sterilization was accomplished under any governmental orders entered against the wishes of the applicant or his wife."

VI. APPLICANT'S POSITION

The applicant stated on appeal that he is entitled to asylum on the basis of our decision in Matter of X-P-T-, supra, and on the basis of the October 21, 1996, memorandum from the Immigration and Naturalization Service's Office of General Counsel. Memorandum, supra. The applicant asserted, however, that the "atrocious form of persecution" standard outlined in the General Counsel's memorandum is inapplicable to an alien who has met the regulatory presumption of a well-founded fear of future persecution based on past persecution and unchanged country conditions. He further asserted that, because country conditions in China have not changed, but have actually worsened, the

presumption that the applicant also has a well-founded fear of persecution has not been rebutted.

VII. ASYLUM AND WITHHOLDING OF DEPORTATION

We find that the applicant in this case has established eligibility for asylum by virtue of his wife's forced sterilization. This position is not in dispute, for the Service conceded in its appeal brief that the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution. *Cf. Matter of Kasinga*, Interim Decision 3278 (BIA 1996).

Inasmuch as the applicant has adequately established that he suffered past persecution, there is a regulatory presumption that he has a well-founded fear of future persecution under 8 C.F.R. § 208.13(b)(1) (1997).[2] *See Matter of X-P-T-*, *supra*, at 3; *Matter of H-*, Interim Decision 3276 (BIA 1996). We reject the Service's assertion that an alien who has established past persecution has an additional burden of establishing a well-founded fear of future persecution by demonstrating that the involuntary sterilization was carried out in such a way as to amount to an "atrocious form" of persecution. There is no additional burden of this nature, either by

[2] Section 208.13(b)(1)(i), provides in relevant part:

> If it is determined that the applicant has established past persecution, he shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return.

regulation or by statute. The applicant need not demonstrate compelling reasons for being unwilling to return resulting from the severity of the past persecution unless the presumption under 8 C.F.R. § 208.13(b)(1)(i) has been rebutted by the Service. *See* 8 C.F.R. § 208.13(b)(1)(ii); *see also Matter of H-*, *supra*, at 15-16. The regulatory presumption may be rebutted only by a showing, by a preponderance of the evidence, that since the time the persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of persecution if returned to his home country. *Matter of H-*, *supra*. In this case, the Service has not alleged or presented evidence of changed country conditions, either at the hearing below or on appeal. In view of the controlling regulations, we find that this applicant has established eligibility for asylum on account of political opinion.

In regard to the applicant's application for withholding of exclusion and deportation, we find that, because he has established past persecution, he is entitled under 8 C.F.R. § 208.16(b)(2) (1997) to a regulatory presumption of a continuing threat in China to his life or freedom. *See Matter of X-P-T-*, *supra*. As this presumption has not been rebutted, we will grant the application for withholding of deportation to China.

VIII. CONCLUSION

This applicant's spouse was forcibly sterilized in China. In view of the enactment of section 601(a) of the IIRIRA and the agreement of the parties that forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse, the applicant has established past persecution. Further, because

of the regulatory presumption of a well-founded fear of future persecution that arises from a finding of past persecution and the absence of changed country conditions, we find that the applicant has demonstrated statutory eligibility for asylum and withholding of deportation, which will be granted.

ORDER: The applicant's request for asylum is granted, conditioned upon an administrative determination by the Service that a number is available for such a grant under section 207(a)(5) of the Act (to be codified at 8 U.S.C. § 1157(a)(5)).

FURTHER ORDER: The applicant's request for withholding of deportation to China is granted.

CONCURRING OPINION: LORY D. ROSENBERG, Board Member

I respectfully concur.

I agree with the decision of the majority in its entirety. The applicant qualifies as a refugee as defined by the statute at section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1994), as amended by section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA"). He is, therefore, entitled to withholding of deportation under section 243(h) of the Act, 8 U.S.C. § 1253(h) (1994), and he is eligible for and has been granted asylum, appropriately, as a matter of discretion, under section 208 of the Act, 8 U.S.C. § 1158 (1994).

My agreement is based not only on the specific language of the statute as amended and the positions of the parties. It also is based on the relevant precedent decisions of this Board, the Federal courts, and the Supreme Court, which have construed the elements contained in the refugee definition and interpreted the proper exercise of discretion in asylum cases. I write separately to emphasize that the presence of a specific clause in the statutory definition of "refugee" pertaining to coercive population control policies does not obviate the applicability of existing standards and principles which make up established refugee doctrine. Its terms are consistent with those standards and principles, which, in and of themselves, support the result we reach in this appeal.

SATISFACTION OF THE REFUGEE DEFINITION

There are two fundamental questions, not squarely addressed by the majority, which arise under our decision. One is the nature of the amendment made to section 101(a)(42) of the Act. The other is the characterization of the views of those who oppose the government policy in question, the harm inflicted, and the reasons for the harm being inflicted.

I Nature of the Amendment Made by Section 601 of the IIRIRA

In my view, we are not granting asylum in this case merely because we are compelled to by a statutory amendment which deviates from established asylum doctrine.[3] We are granting asylum because, in a well-documented and credible

[3] Section 601(a) of the IIRIRA

case, plausible in light of country conditions, the applicant has articulated his and his wife's opposition to a compulsory government policy that fails to respect fundamental human rights, and the punishment they individually and jointly suffered because of that opposition.

The applicant has established past persecution and a well-founded fear of persecution as articulated in the statute and interpreted by agency and judicial precedent. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (holding that according to the decision of the *Supreme Court in INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), a well-founded fear of persecution is established where there exists a reasonable possibility of persecution); *see also Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) (holding that the asylum hearing requires presentation of oral testimony which may expand on the statements made in an application, and in some cases, may establish eligibility for asylum when such eligibility would not have been established by the documents alone).

The amended refugee definition merely specifies that certain persons who have suffered invasive procedures under a coercive population control program, or who have been persecuted for failure to undergo such procedures or for other resistance to such procedures, and those who have a well-founded fear they will be forced to undergo such procedures or be subject to persecution for their resistance to the program qualify under the definition. The scope of the definition at section 101(a)(42)(A) of the Act has not been altered; rather, the amendment simply clarifies that being forced to undergo such procedures or being otherwise harmed or punished

for resisting the program is harm or abuse on account of political opinion.

As I stated in my concurrence in *Matter of Kasinga*, Interim Decision 3278 (BIA 1996), there are essentially three elements critical to meeting the refugee definition. These are a subjective fear of harm supported by objective conditions; a form of harm or punishment rising to the level of persecution; and an explanation for such mistreatment demonstrating that it is motivated, at least in part, by the persecutor's interest in quashing what it considers being an offensive belief or characteristic.

II Actual or Imputed Political Opinion

The right to privacy, the right to have a family, the right to bodily integrity, and the right to unfettered reproductive choice are fundamental individual rights, recognized domestically and internationally.[4] The view that these are

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[4] Recognition of the fundamental nature of the right to procreate is found not only in United States constitutional law, but also in the international human rights standards reflected in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. In 1948, Article 16(1) of the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948), the first comprehensive human rights instrument proclaimed by the United Nations, stated that persons "have the right to marry and to found a family." *See also* Articles 17 and 23(2) of the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), which was ratified by the United States on September 5, 1992 (affirming the right to privacy, family, and home, and the right to marry and found a family); United Nations, Hum. Rt. Comm., General Comments, CCPR/ C/21/ Rev.1/Add.2 (1990) ("[T]he right to found a family implies, in principle, the possibility to procreate and live together. When State parties adopt family planning policies, they . . . should, in particular, not to . . . compulsory."). Emphasis added).

fundamental rights, and that the election to exercise them should be respected and not trampled, constitutes a political opinion. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (holding that the opinion of a victim who contends she or he has been or will be subjected to persecution is critical to determining the motivation for the harm inflicted or feared). However simple or sophisticated an individual's conception or articulation of these rights may be, one who opposes or resists a coercive population control program involving forced abortion and sterilization because he or she believes that it is wrong or improper on personal, ethical, religious or philosophical grounds, holds a political opinion.

Like it or not, *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989), has been overruled by the express statutory language in the amendment, which clarified that actual or feared sterilization, abortion, or other punishment for resistance to a coerced population control program constitutes the type of persecution that qualifies an applicant as a refugee within the meaning of section 101(a)(42)(A) of the Act. *See Matter of X-P-T-*, Interim Decision 3299 (BIA 1996). The rationale for the result reached in that case does not survive any more than does the result which we now acknowledge has been overruled.

It is, at least in part, precisely because the rationale in *Matter of Chang*, *supra*, was erroneous and contrary to accepted imputed political opinion doctrine, that clarification of some sort, which ultimately took the form of a statutory amendment to the refugee definition, was necessary. In fact, the rationale in *Matter of Chang*, *supra*, is inapposite to the recognition of imputed political opinion expressly adopted in subsequent Board decisions such as

Matter of Kasinga, supra, and *Matter of S-P-*, Interim Decision 3287 (BIA 1996). *See also Matter of Mogharrabi, supra* (recognizing imputed political opinion prior to the 1992 Supreme Court decision in *INS v. Elias-Zacarias, supra*). *See generally Ravindran v. INS, 976,* F.2d 754, 760 (1st Cir. 1992); *Canas-Segovia v. INS*, 970 F.2d 599, 601-02 (9th Cir. 1992).

An individual's own refusal or failure to comply with a compulsory population control program, or his or her association with one who expressly resists or opposes such a program, may cause such a political opinion to be imputed to that individual. As discussed below, that individual has a reasonable fear of persecution even if he, himself, was not persecuted at all or as severely as the victim whose views are imputed to him. There is nothing in the doctrine of imputed political opinion, and indeed, it is somewhat antithetical to the doctrine, to suggest that it is only available when the persecuted victim whose views are imputed to the applicant also is applying for asylum.

III Harm and Punishment

The fact that the persecution that is threatened or suffered is the precise conduct or treatment that the victim opposed or resisted does not undermine its characterization as persecution. In some cases, the harm or punishment imposed is distinct from the objectionable practice being opposed (e.g., when a dissident professor lectures and publishes criticisms of a totalitarian government's denial of free speech and democracy, in violation of a governmental policy which seeks to end unauthorized lecturing and publishing, and is exiled). Were the persecuting government to cut out the professor's tongue, seize her computer, and break her fingers to prevent her

from communicating, however, that would be no less persecutory on account of her dissidence.

In the compulsory population control situation in China, the offensive characteristics are remaining fertile and reproducing contrary to government policy, as well as dissidence in opposition to the policy, including both an individual refusal to conform, and the encouragement of others not to do so. The punishment imposed to overcome the offending characteristic may be forced sterilization or abortion, in addition to other sanctions that may amount to persecution such as threats, beatings, detention, incarceration, destruction of property, loss of employment, and harm to other family members.

Neither sterilization nor abortion, in and of itself, is a violation of fundamental human rights, nor does either constitute persecution, *per se*. *See Matter of Kasinga*, *supra*, at 10, including the factor of opposition to female genital mutilation in defining the social group in which the applicant was included, and citing *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993), for its recognition that Iranian women who refuse to conform to the government's gender specific laws and social norms may be able to establish eligibility for asylum. As a consequence of opposition to those practices, however, either procedure, imposed involuntarily, may constitute persecution. Being forced to comply with the very violation of fundamental human rights which one opposes on political, religious, or other grounds, constitutes a type of punishment for a characteristic which the persecutor, in this case the Chinese Government, wishes to quash or overcome. *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*.

We would not conclude that if a dissident opposed her government's practice of torture or protested apartheid, and in response was tortured or banned from even limited intermingling with persons of other rank or race in society, she would have no basis for a future fear of harm because the practice objected to had already been imposed on the dissident, resulting in forced compliance. Only a failure to understand that opposition or resistance to forced abortion and sterilization is the expression and exercise of a political opinion, or choice, can explain the suggestion made by some that once the victim is sterilized and can no longer have children, the persecutor's allegedly legitimate objective has been achieved, so that there no longer would be a basis for persecution motivated by the victim's opposition.

Furthermore, the fact that the persecutor is successful in overcoming one aspect of the belief or characteristic found to be offensive does not mean there is no longer any possibility of either husband or wife being subject to another form of persecution for the same reason. Detention, interrogation, beatings, loss of employment, destruction of possessions or housing, discrimination, and imposition of other disadvantages, either individually or cumulatively, may amount to persecution. Although not all forms of discrimination, harassment, or mistreatment constitute persecution, such determinations must be made on a case-by-case basis. *Cf. Fatin v. INS*, *supra.*

An applicant need not demonstrate that harm already experienced rises to the level of persecution, or that it probably will, in the future, rise to the level of persecution, but that there is a reasonable

likelihood that it may reach that level. *See Abdel Massieh v. INS*, 73 F.3d 579 (5th Cir. 1996). Thus, even putting aside the regulatory presumption under 8 C.F.R. § 208.13 (1997) of a well-founded fear of persecution, which results, in the applicant's case, from our finding that he established past persecution due to his wife's sterilization, he has demonstrated qualifying harm that could independently support a well-founded fear of persecution. *See also Matter of H-*, Interim Decision 3276 (BIA 1996).

IV "On Account Of" and the Mixed Motive Standard

A subjective intent to "punish" is not required for harm to constitute persecution. *See Matter of Kasinga*, *supra*, at 10 (citing *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985)); *Matter of Acosta*, *supra*. Furthermore, the fact that punishment or mistreatment is imposed in response to an individual's opposition or challenge to an official government policy does not make it any less a form of persecution. *See Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990) (finding that punishment for activities undertaken to overthrow a government where democratic means of change are not provided constitutes persecution, because it punishes political opinion that has no alternative expression); *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982) (holding that punishment for refusing to serve in the military in Afghanistan, under the circumstances of the conflict there, would constitute persecution on account of political opinion).

For example, enforcement of the arguably legitimate desire of certain countries to maintain the distribution of professional and skilled persons among their citizenry has not been accepted at face value. *See Rodriguez- Roman v. INS*, 98 F.3d 416, 431 (9th Cir. 1996) (holding that the Board erred in

concluding that the severe punishment an alien would suffer upon return to Cuba following illegal departure would be merely criminal prosecution, and not on account of political opinion); *see also Sovich v. Esperdy*, 319 F.2d 21, 28-29 (2nd Cir. 1963) (finding that despite the imprimatur of a juridical system, given the recent corrupt and inhumane practices of Hitler's regime, it would be naive to suppose that punishment for illegal departure, under most circumstances, is not politically motivated); *Matter of Janus and Janek*, 12 I&N Dec. 866, 873 (BIA 1968).

Thus, the fact that the challenged treatment may be inflicted in furtherance of an official policy pursued by a legitimate government is not necessarily dispositive. It does not mean that imposition of consequences imposed on persons who resist its enforcement is not also motivated by a persecutory intent to punish. *See Matter of S-P-, supra.* This is another respect in which Matter of Chang, supra, was at odds with the law of asylum pertaining to the "on account of" element and required an express clarification in the statute of the international standards upon which it is based.[5]

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[5] According to the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees paras. 56, 57, at 15 (Geneva, 1992) ("Handbook"), evidence that resistance to a law is regarded as a form of political opposition frequently is demonstrated by the imposition of disproportionately severe punishment. In addition, punishment for rebellion against such a law amounts to persecution within internationally recognized standards, as "it is possible for a law not to be in conformity with accepted human rights standards." Id. para 59, at 16.

The proper question is whether the mistreatment suffered or threatened could be imposed, in part, for persecutory reasons. *See INS v. Elias-Zacarias*, *supra* (recognizing that a persecutor may be motivated to harm the victim for more than one reason); *Singh v. Ilchert*, 69 F.3d 375 (9th Cir. 1995); Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees para. 58, at 15-16 (Geneva, 1992) ("Handbook"). Recognizing that persecutors rarely provide direct evidence of their persecutory motivation, we look at such factors as threats or abuse that were directed at overcoming or punishing opinion rather than conduct, mistreatment out of proportion to nonpolitical ends, and treatment of others who were confronted by the alleged agent of persecution. *Matter of S-P-*, *supra*, at 10-11. The invasive and excessive character of the sanction imposed on the applicant's wife belies any claims that can be made to the effect that such treatment merely constitutes the neutral efforts of a government to encourage or ensure cooperation with a benevolent public policy.

As one commentator has noted, "to the extent that the Chinese policy is, in practice, simply a set of incentives for limiting the size of families, it would be difficult to characterize its application to the general population as persecution' . . . . If the penalties imposed were unacceptably severe, however, persecution could be found. The clearest case would be forced sterilization and abortion . . . and a general policy of imposing such measures ought to be deemed persecution." T.A. Aleinikoff, The Meaning of "Persecution" in United States

Asylum Law, 3 International Journal of Refugee Law 23 (1991).[6]

IMPUTED POLITICAL OPINION AND FAMILY RELATIONSHIPS

It is not as unusual as one or all of my colleagues writing separately would make it seem that the applicant should be granted asylum although the harm experienced was not by him, but by a family member. *See Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990) (holding that threat of harm to immediate family, which was due, in part, to the applicant's political activities, and the actual murder of his brother supported a finding of a well-founded fear of persecution); *see also Handbook*, *supra*, para. 43, at 13 (stating that an applicant need not show a threat of persecution based on personal experience, as evidence concerning relatives may support the conclusion that fear is well founded); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985) (concluding that evidence of treatment of one's family is probative of a threat to the petitioner); *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995) (citing *Ariaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991), finding that notwithstanding an utter lack of persecution against the petitioner

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[6] Forced surgical procedures which offend fundamental human rights standards are not any less a form of torture or persecution because they happen to coincide with a governmental objective. Were that the case, Dr. Mengele's experiments under Hitler and the Nazis would be sanctioned. Considering the invasion of bodily integrity and the fundamental international human rights at stake, I can see no basis on which to exempt a forcible sterlization or abortion from being considered persecution on the grounds that is constitutes an official policy of a legitimate government.AUC CONCURRING AND DISSENTING OPINION: Lauri Steven Filppu, Board Member

himself, violence against friends and family which creates a pattern of persecution closely tied to the petitioner may establish a well-founded fear).

It not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate his or her own fear of persecution. *See Rodriguez-Matamoros v. INS*, 86 F.3d 158 (9th Cir. 1996) (finding evidence that the applicant's family was threatened with being burned alive, and that she witnessed her sister being tortured and killed in her presence was probative of her fear of persecution arising from the beating she suffered). Furthermore, in assessing the severity of past persecution, the courts have required the Board to consider the treatment of family members. *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (stating that relevant factors do include not only physical harm suffered by the applicant, but experiences which adversely affected the applicant's personal, religious, or gender-based identity). The treatment of the applicant's wife supports the conclusion that the applicant, by virtue of the events culminating in his wife's forced sterilization, has suffered past persecution and that his fear is well founded.

Moreover, I find that there is no adverse inference to be drawn from the applicant's conduct in leaving China and seeking refuge in the United States some 18 months after he and his wife were pursued and experienced persecution culminating in her sterilization. The fact that the respondent preceded his family is no different from the cultural practice followed by hundreds of thousands of immigrants and refugees who fled anti-Semitic pogroms in czarist Russia, famine in Ireland, fascism in Germany, political or religious upheaval in other

European countries, and civil war and death squads in Central America. The men come first; the husband and father forges the way for the wife and children, who follow when he has established a place to live and a means to support them. In an ideal world, perhaps she who has suffered the more egregious physical persecution should be the first to leave the zone of danger and be afforded refuge. In any event, the applicant's conformity with historical and cultural norms in preceding his wife and family certainly has no bearing either on the merits of his asylum claim or on the exercise of discretion.

I respectfully concur in part and dissent in part.

Given the current state of the law and the positions of the parties on appeal, I agree with the majority that the applicant is entitled to withholding of exclusion and deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1)(1994).[7] I also agree that the applicant qualifies as a refugee under the governing regulations and is eligible for a grant of asylum. Unlike the majority, however, I would remand the case for further proceedings on the question of whether the applicant merits a favorable exercise of discretion in relation to asylum.

A REFUGEE STATUS

The "population control" amendment to section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (1994),

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[7] The equivalent provision for "removal" proceedings is section 241(b)(3)(A) of the Act (to be codified at 8 U.S.C. § 1251(b)(3)(A)), which was created by section 305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA").

allows a person to qualify as a "refugee" in various ways. In essence, the new statutory language directs a finding of refugee status for any person: 1) who previously was subjected to coercive population control procedures (abortion or sterilization); 2) who previously was persecuted for resistance either to such a procedure or to a coercive program; or 3) who currently has a well-founded fear of being forced to undergo an abortion or sterilization or of being persecuted for resisting such measures.[8]

The applicant here does not qualify under the first clause of the new statutory language, as "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization." It was his wife who suffered the sterilization after the birth of the couple's third child in China. Similarly, the applicant does not qualify under the third clause. He has not shown either a subjective fear or a reasonable possibility that he "will be forced to undergo such a procedure" or that he might be "subject to persecution" for a future "failure, refusal, or resistance" on his own account in connection with

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[8] Section 601(a) of the IIRIRA added the following sentence to the definition of "refugee":

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

China's population control practices. *See* 8 C.F.R. § 208.13(b)(2) (1997) (explaining "well-founded fear" test). Indeed, he testified that he had no problems of any sort with the government during the 17 months between his wife's sterilization and his departure from China. And, despite suggestions made by counsel on appeal, there was no claim made during the proceedings below that the applicant intended to divorce his wife or that he otherwise might attempt to have more children with another woman.

Nevertheless, the Immigration and Naturalization Service takes the position in its brief to us, and in the October 21, 1996, General Counsel's memorandum described by the majority, that an alien whose spouse was forced to undergo an abortion or an involuntary sterilization has suffered past persecution. Neither the brief nor the General Counsel's memorandum sets forth the reasoning behind this position on "joint spousal persecution." With respect to the language of the statutory amendment itself, the Service's position would seem to depend on the alien's qualifying, under the second statutory clause, as one "who has been persecuted for failure or refusal to undergo" an abortion or sterilization "or for other resistance to a coercive population control program."

It seems to me that the infliction of an abortion or sterilization procedure on one spouse may or may not lead to the conclusion that the other spouse has been persecuted. For example, a couple may jointly want more children and oppose their government's efforts to restrict family size. In these circumstances, the sterilization of one spouse adversely affects both, as is claimed to have occurred to the applicant now before us. On the other hand, a particular husband might believe the family has

enough children. He then might not oppose the family's compliance with a country's population control laws through his wife's sterilization, even though she may vigorously disagree. Under the amended statute, the wife's sterilization would amount to qualifying persecution of her. But it is not self-evident to me why the wife's sterilization would necessarily amount to past persecution of the consenting husband.

No doubt arguments can be made on both sides of this joint spousal persecution issue, depending conceivably on such matters as the depth of the family's opposition to the invasive procedure employed by their government and the degree of the couple's actual interest in expanding the family. But none of these arguments are now before us. The Service concedes that this applicant should be found to have suffered past persecution. Moreover, I see this question of joint spousal persecution as quite murky, and not likely subject to a "blanket" ruling covering all such cases uniformly. Consequently, I would neither accept the Service's position as properly extending to all cases of this sort, nor attempt to lay down any rule at this time. Rather, I simply accept the Service's concession of past persecution in this case, as such a determination is not foreclosed on this record.

B THE REGULATORY PRESUMPTIONS

As the majority notes, the "past persecution" determination and the absence of evidence of changed country conditions lead to automatic conclusions under the current regulations. Under 8 C.F.R. §§ 208.13(b)(1)(i) and 208.16(b)(2) (1997), the applicant is deemed to have a continuing well-founded fear of persecution and to qualify for withholding of exclusion and deportation. There is

no discretionary component to withholding of exclusion and deportation under section 243(h)(1) of the Act, nor is there any indication in the record that the applicant might fall within any of the categories of persons barred from this relief under section 243(h)(2). Thus, a grant of withholding is in order.

Asylum, however, does have a discretionary component. Moreover, I am reluctant to give the regulatory presumption conclusive effect, in relation to the exercise of discretion, in all cases. This is particularly true where the claimant himself asserts no qualifying fear of future harm and where there seems to be little actual chance of future persecution, notwithstanding the lack of changed country conditions. The regulatory presumption arising from a past persecution finding is certainly appropriate. So, too, is looking at changes in country conditions as a principal basis for overcoming the presumption. But as this case points out that circumstances other than changed country conditions can negate the existence of a well-founded fear of persecution as a matter of fact.

As unfortunate as it was, the wife's sterilization brought the applicant's family into future compliance with China's family planning rules. There is no evidence that Chinese authorities sought to harm this applicant in any way during the 17 months he stayed in China after that sterilization. When asked what he feared if returned to China, the applicant merely said he might be fined or jailed for departing without permission and for lacking a passport. Any "continuing effect" arising from the past sterilization of his wife, specifically, the inability to have more children, will exist regardless of where the applicant and his wife reside. More importantly, this factor is not a "new" injury to be

feared by the applicant on return to China. Consequently, it should be weighed as a factor bearing on the exercise of discretion, not on whether the Chinese Government may inflict new suffering on the applicant.

The majority does not discuss the discretionary side of this case. I recognize that no clear guidance may emerge from such a discussion in the context of this case. But, I would not entirely postpone that question for future cases. Nor do I believe that a generally appropriate regulation controlling eligibility findings also controls discretionary determinations in those cases where the reasonable assumptions underlying the regulation are belied by the actual facts.

C DISCRETION

The applicant testified that both he and his wife opposed the sterilization, that he received no notice that it was going to occur, and that family planning officials entered his home at midnight to seize his wife for the procedure. It certainly is reasonable to infer from these facts that the applicant may have wanted more children. But he never was asked that question and did not volunteer the information during his hearing.

China's family planning practices, moreover, did not prevent the applicant from having any family. The applicant has already fathered three children, two girls and one boy. He paid a 2,000 yuan fine at one point, but also testified that he earned between 800 and 1,000 yuan per month running his own construction business, a partnership. For this applicant, the fine represented between 2 and 3 month's earnings.

The applicant said he was unemployed, however, for about 8 months prior to his departure from China. The circumstances leading to that unemployment were not fully developed. The Immigration Judge expressed some concerns during the hearing respecting the applicant's credibility, and may have been concerned that the applicant's motive for leaving China was purely economic. Nevertheless, the Immigration Judge did not make an adverse credibility finding. And, given the overall consistency of the applicant's testimony in general, I would not make such a finding on appeal.

In the end, I find the record to be inadequate in terms of making an intelligent exercise of discretion on the request for asylum. It is not clear that the severity of the joint spousal persecution by itself would warrant a discretionary grant without some perceptible threat of future harm in fact. In this respect, I understand the aim of our refugee provisions to be the protection of persons from the risk of future harm. Those provisions are not aimed fundamentally at providing compensation for injuries inflicted by foreign governments or by groups not controlled by those governments, even though relief can be obtained for past persecution alone under limited conditions. *See* 8 C.F.R. 208.13(b)(1)(ii) (1997) (providing that past persecution alone can warrant relief if the applicant shows "compelling reasons for being unwilling to return" to the home country "arising out of the severity of the past persecution"); *see also Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

While the applicant now qualifies as a refugee, he did not so qualify under our ruling in Matter of Chang, 20 I&N Dec. 38 (BIA 1989), at the time the Immigration Judge rendered his decision. The

Immigration Judge quite naturally did not approach the case from the perspective of the current statute. As a result, the record, in my view, was not sufficiently developed for purposes of exercising discretion under the changed law. I believe a remand is needed to more fully assess the discretionary aspects of the case and the "severity of the past persecution" for this applicant, as well as to explore any lingering credibility concerns.

DISSENTING OPINION: FRED W. VACCA, Board Member

I respectfully dissent.

The applicant appealed from the decision of the Immigration Judge dated December 9, 1994, finding him excludable and denying the relief of asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h) (1994). The basis of the applicant's asylum claim was his opposition to the population control policies of the People's Republic of China. During the pendency of this applicant's appeal, the definition of refugee was amended by section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA"). The Immigration and Naturalization Service has now conceded the applicant's eligibility for asylum pursuant to that change in the law, and the majority would grant asylum and withholding of deportation based on that concession. I disagree with the majority. Therefore,

I would deny the asylum application and dismiss the applicant's appeal.

REQUIREMENTS FOR ASYLUM AND WITHHOLDING OF DEPORTATION

To establish eligibility for withholding of deportation pursuant to section 243(h) of the Act, an alien must demonstrate a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Stevic*, 467 U.S. 407 (1984). The alien's facts must establish that it is more likely than not that he or she would be subject to persecution for one of the grounds specified in the Act. *Id.*

An applicant for asylum bears the evidentiary burdens of proof and persuasion in any application for asylum under section 208 of the Act. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. §§ 208.13(a), 242.17(c)(4)(iii)(1997). To establish eligibility for asylum under section 208 of the Act, an alien must meet the definition of a "refugee." *See* section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1994), as amended by section 601(a) of the IIRIRA. Accordingly, the alien must show persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* In addition, the statute specifically provides:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a

procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Section 101(a)(42)(A) of the Act.

FACTS

The applicant attempted to enter the United States on April 23, 1993. He testified that he was a privately employed construction worker in China who was forced to comply with China's population control policies. After the birth of his first child, his wife was forced to obtain an IUD, which was later removed without governmental authority. The applicant stated both in his testimony and in his brief on appeal that he was arrested and detained for 1 day by the brigade officials after he protested the fact that his wife was forced to have an IUD inserted "right in their home." After the applicant's wife became pregnant with their second child, she was notified to go for an abortion, but avoided this procedure by hiding with relatives. She subsequently returned home for the birth of their second child. The applicant claimed that he and his wife then left the infant with relatives for the first year after her birth to avoid punishment for violating the population control policies. When questioned by birth control officials about the result of the second pregnancy, the applicant claimed to officials that the child had been stillborn. The applicant stated in his brief on appeal that this was emotionally stressful, and that, when he falsely reported to the authorities that his daughter had

been stillborn, this amounted to "cursing" the child. The applicant and his wife were later fined 2,000 yuan. The applicant's wife subsequently gave birth to a third child, and the applicant asserted that it was after this birth that his wife was forcibly sterilized. At that time, the applicant objected and was threatened with arrest. He claimed in his appeal brief that the trauma he suffered by witnessing his wife being forced to undergo two " invasive and potentially dangerous procedures" was such that the Board should apply the principles of tort law and conclude that the applicant's emotional distress was sufficient to constitute persecution. Finally, he contended on appeal that "as the (applicant) is still married to his present wife . . . the sterilization of his wife also effectively ends his ability to have more children." He cited *Fisher v. INS*, 37 F.3d 1371 (9th Cir. 1994), withdrawn on *rehearing en banc*, 79 F.3d 955 (9th Cir. 1996), and *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), and asserted that Chinese authorities have engaged in "extreme conduct" which is "tantamount to persecution" and that the resulting anguish should be considered.

APPLICANT'S ELIGIBILITY FOR RELIEF

I would find that this applicant, a Chinese male who personally has not undergone or faced the threat of involuntary sterilization, does not come within the definition of a "refugee" as newly defined by section 601(a) of the IIRIRA. The statute is specific and includes only those who were forced to undergo sterilization or abortion, or who were persecuted for failure or refusal to undergo such a procedure. The applicant in this case was not forcibly sterilized in China. He did not refuse to undergo such a procedure. Although he protested

the fact that his wife was forced to undergo the procedure, what happened to him as a result of his protest, a 1-day detention and a fine, was not a level of harm I would find to be past persecution. The majority's attempt to interpret the applicant's claim as "imputed past persecution" based on the past persecution of the applicant's wife defies the rules of statutory construction and is unsupported by the case law. If Congress had desired to include spouses of individuals who had been forced to undergo involuntary abortion or sterilization procedures, they would have done so expressly in the statute. They did not. As the applicant is in this country without his wife, and as this is not a joint application, he has not demonstrated past persecution within the meaning of the statute. Likewise, the fact that the applicant's wife has already undergone a sterilization procedure effectively ended the likelihood that this applicant would be forced to undergo such a procedure in the future, or that he would be persecuted for a failure to undergo such a procedure if he returns to China. The applicant acknowledged that nothing happened to him in China after his wife underwent the sterilization procedure, despite the fact that he remained in China for an additional 18 months. There is nothing in this record to persuade me that this applicant has a well-founded fear of persecution in China.

I also believe that the majority selected the wrong case to test its shaky theory, because this case presents a genuine credibility issue. As noted by the Immigration Judge in his decision, the applicant appeared to be bolstering his claim at the hearing. The Immigration Judge specifically noted that the applicant's story "is changing or getting better from the original claim submitted in July 1993."

Although the applicant's attorney preferred to describe the additional information provided at the hearing as an "elaboration" of the "bare-bone" asylum application, the fact remains that certain very important aspects of the applicant's claim were not mentioned in his initial application. For example, the applicant testified that his wife was forced to have the IUD inserted at their home, and indeed, stated in his brief on appeal that his wife was "grabbed and pinned down by these officials who treated (her) like an animal while he was being taken away and detained, unable to protect his wife as the head of the family." He did not mention this incident at all in his initial asylum application submitted on July 29, 1993. Although he amended his application almost 1 year later to include the IUD insertion and the 1-day detention, the amendment actually contradicted the applicant's subsequent testimony and his brief on appeal, for it indicates that, "after the birth of (his) first child, (his) wife was taken away to have the IUD inserted." (Emphasis added.) No mention was made in either the initial application or the amendment to the application that the applicant's wife was forced to have the IUD inserted at home or while the applicant stood helplessly by. In addition, the applicant claimed both in his testimony and in his brief on appeal that he and his wife were forced to go into hiding to avoid the abortion of their second child, that the child was left with relatives for the first year of life, and that they were forced to claim that the child was stillborn to avoid punishment for having a second child. Neither the asylum application nor the amendment makes mention of these claims.

Finally, I note that there is essentially no corroborative evidence to support the applicant's assertion that his wife was sterilized or that her sterilization was involuntary. The applicant's wife was not present in the courtroom for cross-examination, even though it was she who was most affected by these incidents. Although the record contains an unauthenticated copy of a purported sterilization certificate, there is no indication other than the applicant's own testimony that this document is valid or that the applicant's wife undertook this procedure involuntarily. Moreover, the most significant background evidence submitted by both sides is contradictory, with the applicant submitting newspaper articles claiming a harsh crackdown on births in China and the Government submitting a State Department document dated November 9, 1993, which indicates that there may be "no child limits" in Chang Le County, the same area from which this applicant purportedly has "fled." Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, China - Profile of Asylum Claims & Country Conditions (Nov. 1993). In short, the applicant has not met his burden of proving statutory eligibility for the relief requested absent corroborating evidence. *See Matter of S-M-J-* Interim Decision 3303 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989).

CONCLUSION

I would find that no past persecution or well-founded fear of future persecution has been shown in this case, notwithstanding the recent amendment to section 101(a)(42) of the Act. Accordingly, the appeal should be dismissed.

DISSENTING OPINION: GUSTAVO D. VILLAGELIU, Board Member

The majority concludes that the applicant in this case qualifies for asylum based on imputed past persecution derived from his wife's alleged forced sterilization in 1988. I respectfully dissent.

The facts in this case are detailed in the majority's decision which relies for its conclusion on section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA"), which amended the refugee definition of section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(42) (1994). Section 601(a) reads as follows:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedures or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

A narrow reading of section 601(a) does not support a grant of asylum to this applicant. He has not been forced to abort a pregnancy or undergo involuntary sterilization. His wife allegedly has. The brief 1-day detention and fine he claims to have suffered for resisting has consistently been held not

to rise to the level of persecution. *See Abdel-Masieh v. INS*, 73 F.3d 579 (5th Cir. 1996); *Anton v. INS*, 50 F.3d 469 (7th Cir. 1995); *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995).

The threat of a future arrest if the applicant resists birth control measures in the future has clearly been rendered moot if his wife was sterilized in 1991 as he claims. Consequently, the presumption of a well-founded fear of future persecution prescribed by 8 C.F.R. § 208.13(b)(1)(i)(1997) and *Matter of H-*, Interim Decision 3276 (BIA 1996), appears inapplicable.

I do not question the applicant's wife's potential eligibility under section 601(a) of the IIRIRA if she has been forcibly sterilized, or the applicant's derivative eligibility under 8 C.F.R. § 208 if she were granted refugee status. *See Matter of X-P-T-*, Interim Decision 3299 (BIA 1996). However, I do not agree that her potential eligibility based on past persecution can be imputed to the applicant when she is not present in the United States applying for asylum. Admittedly, my reluctance to join the majority is that I find it implausible that the natural reaction of a husband whose wife has been sterilized, and who deems it persecutive, would be to then proceed to the United States seeking asylum, leaving her behind. Section 101(a)(42) of the Act requires that the reason the refugee is unable or unwilling to return to his country be because of the persecution.

Finally, in view of the limited number of refugee admissions available under section 601(a) of the IIRIRA, I would not extrapolate its reach to impute past persecution where an applicant has not "been forced to abort a pregnancy, or to undergo involuntary sterilization, or . . . persecuted for failure or refusal to undergo such a procedure, or for

other resistance to a coercive population control program." I also would not grant asylum at this time when unresolved credibility questions remain unanswered in this case. *See Matter of S-M-J-*, Interim Decision 3303 (BIA 1997). Consequently, I respectfully dissent.[9]

He testified, however, that he did not register his marriage until 1991. 2 Section 208.13(b)(1)(i), provides in relevant part:

> If it is determined that the applicant has established past persecution, he shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return.

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[9] My dissent should not be misinterpreted as disagreement with section 601(a) of the IIRIRA based on our prior precedent in Matter of Chang, 20 I&N Dec. 38 (BIA 1989), in which I did not participate and which I always found troubling. Moreover, Chinese asylum applications should be given heightened consideration due to the Chinese Government's atrocious human rights record. See Matter of Chen, 20 I&N Dec. 16 (BIA 1989); cf. Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987) (discussing the inclination and capability to persecute as factors in assessing asylum applications); Matter of Acosta, 19 I&N Dec. 211, 226 (BIA 1985), modified on other grounds, Matter of Mogharrabi, supra. However, in view of the limit of 1000 per year on asylum grants based on resistance to coercive population control policies prescribed by section 207(a)(5) of the Act (to be codified at 8 U.S.C. § 1157(a)(5)), I would read section 601(a) narrowly to protect only those explicitly contemplated by the statute.

Memorandum

HQCOU 120/11.33P

Subject	Date
Asylum Based on Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996	

To	From
Management Team Regional Directors District Directors (Including Foreign) chief Patrol Agents Officers In Charge (Including Foreign) Chief, ODTF, Glynco, Gallegos Chief Patrol Agent, BPA, Glynco, Gallegos Asylum Office Directors Service Center Directors Regional Counsel District Counsel	Office of the General Counsel

Background

On September 30, 1996, the President enacted into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (September 30, 1996) (the "1996 Act"). Among many other landmark changes to the Immigration & Nationality Act (the "Act"), Section

601 of the 1996 Act added the following sentence to the end of § 101(a)(42), the Act's definition of refugee:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

This provision is effective immediately. The amendment effectively overrules the Board of Immigration Appeals precedent on this issue represented by *Matter of Chang*, 20 I&N 38 (BIA 1989) and *Matter of G-*, 20 I&N 764 (BIA 1993). In those cases, the Board held that implementation of population control policies by coercive means is not on its face a basis for asylum eligibility, event to the extent that involuntary sterilizations or forced abortions may occur. According to past Board precedent, in order to prevail on a request for asylum based on coercive family planning practices, the applicant had to establish that the policy was being "selectively applied against [the applicant] as a member of a particular religious or other social group, or being used as a means to punish [the

applicant] because of his race, religion, nationality, or political opinion." *Matter of G-* at 778.

Recognizing the compelling humanitarian factors such claims can involve, however, the Deputy Commissioner established an administrative program independent of asylum to provide protection to those persons facing coercive population control practices. This program was introduced in a memorandum issued on August 5, 1994 which allows district directors to exercise their discretion to release from detention and to stay the repatriation of Chinese nationals who credibly demonstrate that they 1) face imminent danger of forced abortion or involuntary sterilization; 2) have suffered or would suffer severe harm for refusing to submit to an abortion or sterilization; or 3) have suffered or would suffer severe harm because they violated other unreasonable family planning restrictions. The Deputy Commissioner revised the program by issuing enhanced procedures on June 7, 1996. Given the amendment to the refugee definition, however, this discretionary administrative program has become unnecessary, and the Deputy Commissioner has authorized us to include in this memorandum the following directive: immigration officers are no longer to follow the procedures set forth in the August 5, 1994, and June 7, 1996 memoranda, effective immediately.

Eligibility for Asylum and Withholding of Deportation

By linking resistance to coercive population control practices to political opinion, Section 601 of the 1996 Act relives applicants of the burden of demonstrating a nexus between the persecution for their resistance to such practices and a status

protected under the Refugee Act. Under the new law, one who has been forced to abort a pregnancy, forced to undergo sterilization, or otherwise persecuted for refusal to undergo to undergo such a procedure "shall be deemed to have been persecuted on account of political opinion." In like manner, on who has a well-founded fear of being forced to undergo an abortion or sterilization, or a well-founded fear of being persecuted for failure, refusal, or resistance to such procedures "shall be deemed to have a well-founded fear of persecution on account of political opinion." There is no need for the applicant to demonstrate independently that the program was being selectively applied to him or her due to membership in a particular religious or social group, or being used as a means to punish the applicant due to race, nationality or political opinion.

Similarly, applicants who base their claim for withholding of deportation on resistance to coercive population control practices are relieved of the burden of establishing that the threat to the applicant's life or freedom is on account of race, religion, nationality, membership in a particular social group, or political opinion. The statute automatically provides that nexus.

In asylum claims based on coercive population control practices, Service attorneys and asylum officers should examine the issues raised by all asylum claims. These include, for example, whether the applicant is unable or unwilling to return to his or her country of nationality, the opportunity for internal relocation, whether the harm is severe enough to constitute persecution, and whether there are subjective and objective bases for considering the applicant's fear to be well-founded. Service attorneys and asylum officers should also consider

the applicability of any of the statutory and regulatory bars to asylum. *See* INA § 208(b)(2); 8 CFR § 208.14(d).

Credibility

This change to the refugee definition does not require that asylum be granted to every applicant alleging a claim based on coercive population control programs. As always, credibility of the applicant will be a key concern. Except in those cases which are extremely well-documented prior to a hearing or interview, Service attorneys should not stipulate to a grant of asylum prior to a hearing. As with any case, the trial attorney or asylum officer should closely examine the applicant's past experience, comparing the applicant's live testimony with prior statements, examining any documentary evidence provided by the applicant's home country, region, or town.

Past Persecution

An applicant who demonstrates that he or she was persecuted in the past meets the statutory refugee definition under INA § 101(a)(42) if the persecution is on account of a protected ground, and the applicant is not disqualified under the second sentence of the definition. The relevant question then becomes whether such an applicant is eligible for a grant of asylum in the exercise of discretion. One key factor to be considered in the exercise of discretion is whether the applicant has a well-founded fear of future persecution. *Matter of Chen*, 20 I&A 16 (BIA 1989). Current regulations provide that an applicant who has established past persecution is presumed to have a well-founded fear of future persecution. In cases where the INS rebuts the presumption by establishing by a preponderance

of the evidence that there is no longer a well-founded fear of future persecution, asylum generally will be denied as a matter of discretion. However, even if there is little likelihood of persecution in the future, asylum may be granted if the applicant has suffered under "atrocious forms of persecution." *Matter of Chen*, quoting the *Handbook on Procedures and Criteria for Determining Refugee Status* at ¶136. *See also* 8 CFR § 208.13(b)(1)(ii) which requires the applicant who does not have a well founded fear of future persecution to demonstrate "compelling reasons" arising out of "the severity of the past persecution" for his unwillingness to return to his country. These principles should be applied to all claims, including those based on coercive population control practices.

Claims involving past persecution in connection with coercive population control practices can raise difficult issues, particularly in cases involving involuntary sterilization of the applicant and harm inflicted upon the applicant's spouse. Until these issues are addressed in BIA or judicial decisions, the following discussion represents our best view of the governing law.

The amended refugee definition provides that a person who is forced to abort a pregnancy or to undergo an involuntary sterilization is deemed to have been persecuted on account of political opinion. Accordingly, to establish past persecution based on an abortion or sterilization, the applicant must demonstrate that he or she was "forced" to undergo the procedure. We believe that the procedure should be considered "forced" only when the applicant demonstrates that he or she was physically coerced or would have faced harm rising to the level of persecution if he or she had failed or refused to

undergo the procedure. For instance, the imposition of a fine alone would not be sufficient basis to consider the procedure to have been "forced," unless the fine would result in such a substantial economic deprivation that it would constitute persecution. A sterilization or abortion effected through physical coercion or the threat of a substantial prison term would, in most cases, meet the requirement of being "forced."

In cases where an applicant has been forcibly sterilized there may be little reason to suspect that he or she will be subjected to mistreatment in the future. Barring any indication that the family planning authorities have an inclination to continue punishing the applicant, the successful imposition of measures to eliminate the applicant's ability to procreate would presumably end the authorities' interest in him or her. Nonetheless, if involuntary sterilization was carried out in such a way as to amount to an "atrocious form" of persecution, the applicant would be presumed to merit a favorable exercise of discretion, barring any adverse factors. These determinations, however, should be made on a case-by-case basis, depending largely on the degree of trauma, both emotional and physical, suffered by the applicant. *See Matter of Chen*; *Matter of H-*, Int. Dec 3287 (B)A 1996).

Cases where the applicant demonstrates that his or her spouse has been forced to undergo an abortion or involuntary sterilization raise the issue of what constitutes past persecution. In general, we believe that an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition. In such a case, the applicant may

or may not have a well-founded fear of future persecution. If the applicant does not have a well-founded fear of future persecution, he would only merit a favorable exercise of discretion, pursuant to *Matter of Chen*, if the abortion or involuntary sterilization is determined to be an "atrocious form" of persecution to the applicant. This would depend on the specific facts of the case, such as the degree of trauma, both emotional and physical, suffered by the applicant and the circumstances of the marriage.

Motions to Reopen

Many asylum applicants who based their claims, unsuccessfully, on coercive family planning practices will likely file motions to reopen their cases. For decisions of an immigration judge or the Board, a motion to reopen must be filed not later than 90 days after the date on which the final administrative decision was rendered, except:

> (ii) To apply or reapply for asylum, or withholding of deportation, based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the former hearing; or
> (ii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding.

61 Fed. Reg. 18900, 18905 (1996) (amending 8 CFR § 3.2(c)(3)).

Since motions to reopen in this context would generally not be based on changed country

conditions, the proceedings should only be opened if the INS agrees. The INS's position on these motions should be determined on a case-by-case basis.

In many cases, the file will have been reviewed by a trial attorney pursuant to one of the Deputy Commissioner's memoranda for discretionary humanitarian relief for certain nationals of the People's Republic of China. In cases where humanitarian relief was granted, the INS should join the motion to reopen, and should presumptively enter a stipulation of asylum eligibility, barring the presence of new facts that cast doubt on the earlier administrative determination or weigh heavily against a grant of asylum in the exercise of discretion.

In cases where humanitarian relief was denied or there was no file review for humanitarian relief, the INS should consider motions to reopen on a case-by-case basis. INS attorneys should determine whether the applicant was found credible by the immigration judge and whether his or her claim meets the criteria of the revised refugee definition. If the applicant was found credible by an immigration judge, or there was not an explicit credibility finding, and his or her claim falls within the refugee definition, the INS should join the motion to reopen, reserving the right to challenge the applicant's asylum eligibility during the course of the reopened asylum proceeding. If the Service attorney determines that the applicant is credible and the claim falls within the revised refugee definition, he or she should consider a stipulation of asylum eligibility. If not, the Service attorney should explore the issue of credibility in the course of the reopened asylum proceeding.

The INS should oppose the motion to reopen in cases where: 1) the applicant was explicitly found lacking in credibility by an immigration judge; 2) a review of the claim indicates that it does not fall within the revised refugee definition; or 3) the alien did not previously base an asylum claim on coercive population control practices. In many cases, however, there may not be an explicit credibility determination and it may not be clear whether the applicant's claim falls within the new refugee definition. INS's position on these cases should be determined on a case-by-case basis.

The above discussion applies to motions to reopen that may be filed with an immigration judge or with the Board of Immigration Appeals. Asylum offices, however, may also receive motions to reopen cases where the asylum office previously denied an asylum claim that was based on coercive population control practices. Asylum offices should treat these motions consistently with the guidelines set forth above.

Ceiling for Asylum Grants and Refugee Admissions

In addition to the revision of the refugee definition in § 101(a)(42) of the INA, section 601 of the 1996 Act sets a limit on the number of refugee admissions or asylum grants on the basis of coercive family planning practices. The application of this limit would not affect an applicant's entitlement to withholding of deportation based on coercive population control practices. Specifically, the 1996 Act amends subsection 207(a) of the INA by adding paragraph 5, which provides:

(5) For any fiscal year, not more than a total of 1,000 refugees may be admitted under this subsection or granted asylum under section 208 pursuant to a determination under the third

sentence of section 101(a)(42) (relating to persecution for resistance to coercive population control methods).

In order to adhere to this provision, it will be necessary for the INS to keep track of the number of such asylum grants or refugee admissions over the course of each fiscal year, and to advise the appropriate adjudicators when the number approaches 1000. We are working with the Office of International Affairs and with the Executive Office for Immigration review to develop procedures for tracking asylum grants and refugee admissions. In the meantime, the relevant INS offices should take steps to ensure that the office maintains a record, by name, alien number, date of birth, and the date of grant (or admission), of any person granted asylum or admitted as a refugee under the third sentence of section 101(a)(42), within the responsibility of that office.

David A. Martin
General Counsel